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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-74

PIPEFITTERS LOCAL UNION NO. 562, et al.,
Petitioners,

vs.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

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INDEX

Cases Cited

Statutes Cited

Miscellaneous Cited

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OPINIONS BELOW

The majority and dissenting opinions of the panel of the Eighth Circuit Court of Appeals are reported at 434 F.2d 1116 and are printed in the Appendix at pp. 1128-49. The majority and dissenting opinions of the Court of Appeals sitting *en banc* are reported at 434 F.2d 1127 and are printed in the Appendix at pp. 1153-59, 1159-78.

JURISDICTION

The judgment of the Court of Appeals on rehearing *en banc* was entered on November 24, 1970. A timely petition for rehearing was denied on December 17, 1970. On January 6, 1971 Mr. Justice White extended the time for filing of the petition for writ of certiorari to February 1, 1971. The petition for writ of certiorari was filed on January 29, 1971, and was granted on May 24, 1971 (91 S.Ct. 2168). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Courts below improperly construed Section 610, Title 18, U. S. C. in holding that the indictment alleged an offense and the evidence was sufficient to sustain a conviction for conspiracy to violate Section 610, Title 18, United States Code, where both showed that the funds expended for political purposes were not funds of the union and were never commingled with the union funds, but instead were funds of a political organization which received its funds from direct voluntary contributions from individual members of the union and other individual pipefitters who worked under the jurisdiction of the union?

2. Whether the District Court prejudicially erred in instructing the jury that it could find the defendants guilty even if it believed that all of the contributions to the separate Voluntary Fund were voluntarily made.

3. Whether Section 610, Title 18, United States Code, as construed and applied by the Courts below and on its face, abridges the petitioners' rights, as well as the rights of all union members, of freedom of speech, press and assembly and the right to petition the Government for redress of grievances, in violation of the First Amendment of the Constitution of the United States?

4. Whether Section 610, Title 18, United States Code, as construed and applied by the Courts below and on its face, is so vague, indefinite and uncertain as to deprive petitioners of due process of law and fails to provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments of the Constitution of the United States?

5. Whether Section 610, Title 18, United States Code, as construed and applied by the Courts below and on its face is an unjustifiable arbitrary discrimination which deprives unions, its members and persons of the laboring class of liberty and property without due process of law in violation of the Fifth Amendment?

6. Whether Section 610, Title 18, United States Code, as construed and applied by the Courts below and on its face, unlawfully abridges the rights of petitioners and all union members to vote and choose their Senators and Representatives in Congress, as guaranteed by Article I, Section 2, and the Seventeenth Amendment to the Constitution of the United States?

7. Whether the jury by making a special finding in its verdict "that a willful violation of Section 610 of Title 18 United States Code was not contemplated" found lacking an essential element of any conspiracy under Section 371, Title 18, United States Code to violate a substantive statute which is malum prohibitum, and thereby acquitted the petitioners?

8. Whether the Court of Appeals *en banc* below erred in refusing to rule on the question as to whether the instructions of the District Court were incorrect.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 610, Title 18, U. S. C., provides as follows:

"It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential or Vice-Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

"Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"For the purpose of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Section 371, Title 18, U. S. C., provides as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Section 2106, Title 28, U. S. C., provides as follows:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963."

First Amendment, Constitution of the United States provides in pertinent part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fifth Amendment, Constitution of the United States, provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law;"

Sixth Amendment, Constitution of the United States provides in pertinent part:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation;"

Seventeenth Amendment, Constitution of the United States provides in pertinent part:

"The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

Article I, Section 2, Constitution of the United States, provides in pertinent part:

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

STATEMENT

A. Indictment. Petitioners, Pipefitters Local 562 and three of its officers* were convicted by a jury verdict on a one-count indictment which charged them with having conspired from in or about 1963 to the date of the indictment, May 9, 1968, to violate Section 610, Title 18 U.S.C., by conspiring to have Pipefitters Local 562 make contributions and expenditures in elections for Federal Office (Tr. 2061; A. 1106).[1] The indictment detailed the alleged conspiracy in 18 paragraphs and 61 overt acts (A. 17-25). In doing so, it charged that petitioners "would establish and maintain a special fund entitled 'Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund,' which fund would have the appearance of being a wholly independent entity, separate and apart from Local 562 * * *" (Tr. 2061-62; A. 1106); that petitioners "in order to facilitate an orderly, regular and systematic collection of contributions to the Fund, would cause the agents of the Fund [who were foremen, stewarts, officers, members and employees of Local 562] to distribute to the pipefitters working at all job sites contribution agreement cards to be signed by such pipefitters," and that such agents of the Fund, "would advise newly employed pipefitters at such job sites of the existence of the Fund and of the rates of participation," (Tr. 2063-64; A. 1107); that petitioner "by means of the creation and operation of the Fund would continue in new form the practice of collecting for political purposes One Dollar

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* Petitioner Callanan died while the petition for a Writ of Certiorari was pending.

[1] The jury also made a special finding "that a willful violation of Section 610, of Title 18, United States Code was not contemplated." (Tr. 2083; A. 1126). Each of the individual defendants was sentenced to imprisonment for a term of one year and to pay a fine of $1,000.00 and the union defendant to pay a fine of $5,000.00 (Tr. 2093).

($1.00) per day worked from members of defendant Local 562 and, Two Dollars ($2.00) per day worked from non-member pipefitters employed on jobs within the jurisdiction of defendant local 562." (Tr. 2062-63; A. 1107);[2] that such agents collected such contributions on such regular systematic basis on the job sites and at the headquarters of Local 562 (Tr. 2060, 2063-64; A. 1105, 1107-08); that petitioners made contributions and expenditures to Federal candidates in the 1964 and 1966 elections **by checks on said Fund** in the approximate amount of $150,000 (Tr. 2064; A. 1108).

The indictment then alleged that said Fund was in fact a Fund of Local 562 (Tr. 2060; A. 1105, 1107-08), and that it was established and maintained for the purpose of concealing the fact that Local 562 was making political contributions (Tr. 2061-62; A. 1106). The indictment did **not** contain an allegation that any of the contributions to said **Fund were involuntary** or that the pipefitters making such contributions were unaware that the contributions would be expended for political expenditures and contributions. Of course, the indictment did not allege that any of the Local's own funds or member's dues were involved, or commingled with the monies of the Political Fund.

The 61 overt act dealt specifically with the Fund, consisting mostly of deposits and withdrawals from the Fund's bank accounts.

B. **Pre-Trial Motions.** Petitioners' Motion to Dismiss contained, *inter alia*, the following paragraphs (A. 27-8): requested (A. 30):

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[2] The Fund had first been established in 1949, shortly after the enactment of Section 610 (Tr. 1767, 1786; A. 972, 984) and continuously maintained thereafter. Certain revisions were made in it in late 1962 and early 1963, which we shall relate, *infra*, pp. 16-23.

"9. Although Paragraph 7 of the indictment alleges that the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund was a Fund of Local 562, it does not allege that the contributions or payments made to said Fund were not wholly voluntary nor that the pipefitters who contributed to said Fund did not do so voluntarily and were not fully aware that the money so contributed would be used for political contributions and expenditures and the other non-union purposes of said Fund. Nowhere in the indictment does the indictment allege that any of the contributions to said Fund were involuntary or that the pipefitters making such contributions were unaware that the contributions would be expended for political expenditures and contributions.

"10. The indictment fails to allege that the contributions and payments to the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund were involuntary or that they were dues, or that the payments to said Fund were necessary for membership in Local 562, or, as to non-member pipefitters employed on jobs within the jurisdiction of Local 562, required and necessary in order for said pipefitters to be so employed.

"11. The gist of the indictment is to allege that Section 610, **United States Code**, prohibits labor unions from forming parallel political organizations which receive voluntary contributions from the members of the union to be contributed and expended in Federal elections. Congress intended such political organizations to be legally authorized. Thus, the indictment fails to state an offense; and as so construed and applied, violates the provisions of the United States Constitution as set forth herein above.

"12. The allegations of the indictment, on its face, show no violation of the law, in that such allegations

affirmatively show that the expenditures and contributions were made by the Pipefitters Voluntary, Political, Educational, Legislative, Charity and Defense Fund; that said Voluntary Fund was a political organization which raised its funds by direct contribution from individual members of Local 562 and by direct contributions from individual members of other locals, and did not receive, contribute, or expend any funds of Local 562, or any other labor union."

In their motion for a Bill of Particulars, petitioners' requested (A. 30):

"2. With respect to paragraphs 7, 10 and 17 of the indictment, state whether it is the government's position and theory of the case that the mere fact that the Pipefitters Voluntary, Political, Educational, Legislative, Charity and Defense Fund was established, maintained, and administered by members, officers, employees, agents, foremen and shop stewards of Local 562 is, in and of itself, sufficient to make said Fund, under the law, a Fund of Local 562. State whether or not it is the government's position that Section 610, Title 18, U. S. Code, prohibits the members, officers, employees, agents, foremen and shop stewards of a union from establishing any political organization or fund for the purpose of making contributions and expenditures in connection with elections at which presidential and vice-presidential electors or United States Senators and Representatives to Congress are to be voted for. With further respect to said paragraphs of the indictment, state whether it is the government's position and theory of the case that the alleged 'regular and systematic collection, receipt, and expenditures of money obtained from working members of Local 562 and from working members of other labor organizations employed under jurisdiction of the defendant Local 562' were voluntary or involuntary collections and contributions."

The motions were thoroughly briefed for the District Court. See Joint Memorandum of Defendants in Support of Their Motions to Dismiss, wherein petitioners presented to the District Court in detail the interpretation of Section 610, and the constitutional issues, that are advanced in this Brief (A. 34-53).

In the Government's Memorandum in opposition to Petitioners' Motion to Dismiss, the Government stated (A. 56):

> "Proof of the offense charged here does not depend upon whether the funds were volunteered or not by union members."

On hearings on these motions, the Government asserted orally that it was their position that voluntariness of the contributions to the Political Fund was not essential for the offense Motion (Tr. 35-6, 40). All motions were overruled (A. 3-4) by the District Court without opinion.

C. **Government's Theory at the Trial.** We believe the Court can better comprehend the course of the trial and evidence as navigated by the Government by first relating the manner in which the Government asked the District Court to submit the case to the jury, which was modified only as stated in footnote 3, *infra*, by the District Court. The Government asked the Court to charge, which it did over objection (Tr. 1955; A. 1092), that the jury must find that the Voluntary Fund was in fact a fund of the Local (Tr. 2070; A. 1112-13). The Government's requested instruction then continued as follows (Tr. 2070-3; 1955-6; A. 1113-15, 1092):

> "In determining whether the Pipefitters Voluntary Fund was a bona fide fund, separate and distinct from the union or a mere artifice or device, you should take into consideration all the facts and cir-

cumstances in evidence, and in such consideration you may consider

"1. Whether or not payments to the fund were routinely made at regular intervals at job sites,

"2. Whether or not payments to the fund were routinely collected by union stewards, foremen, area foremen, general foremen, or other agents of the union,

"3. Whether or not the payment to the fund was determined by a formula based upon the amount of hours or overtime hours worked upon a job under the supervision of the union,

"4. Whether or not payments to the fund were at one rate for 562 members and at a different rate for members of other unions,

"5. Whether or not payments to the fund began, continued and terminated with employment on a job under the jurisdiction of the union,

"6. Whether or not monies of the fund were used to provide benefits to union members in their capacity as members,

"7. Whether or not payments to the fund by members of other unions were in lieu of payments to the union in the form of travel card dues in the amount of eight dollars per month,

"8. Whether or not monies of the fund were used in part to promote activities properly permitted to the union pursuant to Section 2.05 of its Constitution and by-laws,

"9. Whether or not payments to the fund were made by those affiliated with the union to the general exclusion of other classes of persons or organizations,

"10. Whether or not expenditures from the fund were under the control of the union and its officers,

"11. Whether or not records used in the collection of payments to the fund are similar to those employed from time to time by the union in the collection of its regular dues and assessments."[3]

The Government then requested, and the Court instructed over petitioners' objection (Tr. 1956-7, 2075; A. 1093, 1116), that:

"A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary Political Educational, Legislative, Charity and Defense Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all other facts and circumstances in evidence, in determining whether

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[3] This instruction, though still objected to by petitioners, was modified by the Court at the petitioners' request by adding the following paragraphs between 9 and 10 of the Government's request (Tr. 1955-6; A. 1092):

"10. Whether or not contributions to the fund were required as a condition of employment or continued employment of membership in Local 562,

"11. Whether or not the individuals who contributed to said fund signed a voluntary contribution agreement,

"12. Whether or not the contributions to said fund were made voluntarily or involuntarily,

"13. Whether or not the monies contributed to said fund were kept separate and distinct from the funds of Local 562,

"14. Whether or not some persons who worked under the jurisdiction of Local 562 did not contribute to said fund,

"15. Whether or not the monies of said fund were used in part to promote activities which were prohibited to Local 562 by its Constitution and By-Laws,

"16. Whether or not said fund was established and maintained pursuant to the advice of counsel,

"17. Whether or not the monies of said fund were reported to the Department of Labor on the LM-2 forms, which required the reporting of monies of Local 562."

the fund is a union fund. However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money."

Further, though Government's Counsel labored hard during the trial to elicit bits of evidence which might infer that some pipefitters may have paid into the Fund involuntarily, throughout the trial the Government cautiously proceeded on the theory that involuntariness of the payments to the Political Fund was of little, or no, moment; and certainly not essential to the offense (See, e.g., Tr. 1242-3; A. 629).

We now undertake to summarize the evidence adduced at the trial.

D. **Creation and Maintenance of Political Fund in Years Prior to the Period Alleged in Indictment.** As we have noted, the indictment alleged that the conspiracy began in or about 1963. The Local 562 Political Fund was actually created in 1949, and maintained continuously thereafter (Tr. 1767, 1786; A. 972, 984). The Government apparently picked the date contained in the indictment as a starting point because of certain events and changes which occurred in late 1962 and early 1963, where the name of the Fund was changed from "Voluntary Political, Educational and Legislative Fund" (usually just referred to as the Political fund), to "Voluntary Political, Educational, Legislative, Charity and Defense Fund" (Tr. 1767-1786; A. 971-84). From the beginning it was contributed to by Journeymen Construction Pipefitters who worked on jobs under the jurisdiction of Local 562, without regard to actual membership in the Local (Tr. 1787-8, 1937-8; A. 985, 1086).

In 1949 all Journeymen Construction Pipefitters who worked on jobs under the jurisdiction of Local 562,

whether members of Local 562 or other locals,[4] were assessed working dues by Local 562 of twenty-five cents per eight hours working day. This working dues assessment of both members and non-members working on jobs under the jurisdiction of Local 562 was continued until the end of the year 1962, by which time it had been increased to fifty cents per eight hours working day (Tr. 1787-1835; A. 984-1018). Throughout this period, Local 562 did not have a contract for check-off of working dues assessments by the contractor-employers, and the assessments were collected directly from the union members. Most frequently this was done by the union stewards on the job sites. Occasionally a foreman acted also as a steward on a temporary basis and made the collections, especially when only a few pipefitters were working on the job. Some members paid their assessments directly at Local 562's headquarters, either in person or by mail (Tr. 190-92, 342, 381-82, 628, 689, 947; A. 66-7, 154, 179, 289-90, 329, 451).

When the Political Fund was first established in 1949, separate contributions were also made by Journeyman Construction Pipefitters working on jobs under the jurisdiction of Local 562 to the Voluntary Political Fund. They too started in 1949 at twenty-five cents per eight hour working day, and by 1962 had been increased to fifty cents. In the recommended contributions to the Fund, no distinction was made (as with working dues

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[4] Local 562 which had territorial jurisdiction over about half of the State of Missouri, had joint territorial jurisdiction with small locals at Cape Girardeau in Southeast Missouri, and Hannibal, in Northeast Missouri. Local 562 had the big jobs and the rural locals the small jobs (Tr. 1771-79; A. 974-79). Many members of the two rural locals regularly worked on jobs under the jurisdiction of Local 562 in their area. The negotiated wage scale of Local 562 was much higher than that of the rural locals, especially in the area of the two rural locals, because Local 562's negotiated contract provided for higher wages by zones distant from their home location in St. Louis (Tr. 1819-32, 1856-58; A. 1007-16, 1032-33).

assessment for the Local) between members and non-members of Local 562. The contributions were collected in a manner similar to that of working dues assessments for the Local, that is, usually on the job by the job union steward (Tr. 1787-88, 1838-39; A. 985, 1020), although they were sometimes taken or sent directly by the worker to the Fund offices (Tr. 1787-88, 1838-39; A. 985, 1020).

Since the period from 1949 through 1962 was not alleged in the Indictment, the record does not contain any details of the operation and management of the Fund prior to the year 1963. However, it does appear that the monies of the Fund were always kept and maintained separate and apart from the funds of the Local (Tr. 721, 1001; A. 350); that they were disbursed by the Director of the Fund (Tr. 1839; A. 1020); and that from its inception in 1949 many of the pipefitters did not make contributions or payments into the Voluntary Political Fund (Tr. 1100, 1121, 1133, 1607; A. 541, 553-54, 561, 869). There is substantial evidence that Contributions to the Political Fund were always on a voluntary basis (Tr. 955-6, 501, 508, 642, 677, 714, 745, 899, 774, 996-7; A. 456-57, 256, 260, 299, 321, 345-46, 365, 422, 383-84, 482-83).[5]

E. **1962 Contract Negotiations.** In the fall of 1962, Pipefitters Local 562 was preparing to start negotiations for a new contract with the Mechanical Contractors Association (for most of the Construction Division of the Local), as their contract was expiring on June 14, 1963 (Tr. 1794-95; A. 990). For about 15 years, Local 562 had been represented by attorney Harry Craig, a prominent St. Louis

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[5] The testimony of 99 foremen, stewards, and members of Local 562 and non-members who worked under the jurisdiction of Local 562, with respect to contributions, collections, non-contributions and voluntariness of contributions or payments into said Fund, from its inception to the time of the trial is summarized hereinafter in Subsection H of this Statement, *infra* pp. 29-40.

labor attorney (Tr. 1788, 1874, 1885-87; A. 986, 1044, 1051-52).

One of the items which Local 562 negotiated in its new contract was checkoff of union dues and working assessments dues by the contractor employers. The officers of Local 562 frequently consulted with attorney Craig on this issue as well as many others (Tr. 1790-91, 1887-1890; A. 987, 1052-54). At this time petitioner Lawler was both Director of the Fund and Business Manager of Local 562. Petitioner Seaton was a business representative of the Local but held no position with the Fund. Petitioner Callanan did not then hold any office with either the Local or the Fund (Tr. 1789-90; A. 986). Lawler, Seaton and the president of Local 562, Mr. Steska (who was named in the indictment as a co-conspirator) also consulted with Attorney Craig as to the validity of checkoff of pledged contributions to the Voluntary Political Fund (Tr. 1791-93, 1796-97, 1890-91, 1899-1900; A. 987-89, 991, 1054-55, 1060-61).

Attorney Craig also represented Teamsters Local 688 (A. 1054-57), as well as many other Unions (Tr. 1885-86, 1890-92; A. 1051). In 1960, Teamsters Local 688 and other teamster locals and officers had been presented in the Eastern District of Missouri, the District below, for alleged violation of Section 610 wherein the District Court held that the procedure which they had followed did not violate Section 610. **United States v. Warehouse and Distribution Workers' Local 688 et al.**, 47 L.R.R.M. 2005 (E. D. Mo. 1960).

The Teamsters had used a form of checkoff for contributions to their political Fund by which the Locals had obtained signed cards from those workers who desired that a portion of his Local's dues be allotted to the political Fund. Only a portion of the dues of those who

signed the cards were so allotted to the political Fund, but a corresponding amount of the other members' dues was not refunded. The District Court still held this to be valid, on the ground that the political donations were voluntary. *Ibid.*

Attorney Craig at first advised petitioners to follow the Teamster plan. He also told them that checkoff of both the local's dues and working assessments dues and the men's pledged contributions to the Voluntary Political Fund was valid, following the Teamster procedure, for both members and non-members, provided voluntary pledge cards were first obtained from workers who desired that a portion of their dues go to the Political Fund (Tr. 1792-93, 1796-97, 1843-44, 1866-68, 1890-94; A. 988, 991, 1023-24, 1038-40, 1054-57). Accordingly, on November 21, 1962, the Executive Board of Local 562, passed a resolution for a recommendation to the membership to be made on November 24, 1962 (G. Exh. 105, Tr. 1796-97; A. 991). Here, so we understand the Government, was the beginning of the **alleged** conspiracy.

The recommendation was as follows:

> "Your Executive Board unanimously recommends that our Local Union members adopt a dues checkoff system for each journeyman and apprentice. That amount shall be 4 per cent assessment plus dues of each member's gross pay to be paid to the Secretary-Treasurer every week by the employer. Out of this the Secretary-Treasurer shall keep two and one-half per cent for the purpose of operating our Local Union. The Secretary-Treasurer shall turn over one and a half per cent of the 4 per cent to the business manager, who has charge of our Voluntary Political Educational and Legislative Fund. Under our present wage scale this should give the Secretary-Treasurer

ninety-two one-half cents a day per man and your Voluntary Political Educational and Legislative Fund fifty-five one-half cents a day per man. This will mean an increase of 48 cents a day for each member. This 4 per cent assessment plus dues to take effect as soon as the business manager can get our Contractors Association, and all others who hire our building trades journeymen and apprentices to agree to the checkoff system."

On November 25, 1962, attorney Craig changed his recommendation, not because he was afraid the Teamster procedure would violate Section 610, but for an entirely different and foreign reason. Further study of the then new Landrum-Griffin Act (73 Stat. 519), caused him to become fearful that, if Local 562 collected dues and assessments (or even travel card dues) (Tr. 1833, 1872-73, 1898-99; A. 1016, 1042-43, 1060-61), that is, any kind of dues from non-members, the Local would be required by the recently enacted Landrum-Griffin Act, as it combined with the already existing provisions of the Taft-Hartley Act, to accept such non-members into membership in the Local. This would have greatly jeopardized the job security of members of Local 562 (Tr. 1796-1801, 1853, 1858, 1869; A. 991-94, 1030, 1033, 1040-41). Consequently, lawyer Craig hastily recommended that the Local immediately stop accepting dues and assessments dues from non-members, without even waiting until the new contract was negotiated (Tr. 1846-47, 1869, 1895-99; A. 1025-26, 1040-41, 1057-61).

At the same time he also recommended that contributions to the Voluntary Political Fund not be collected by the checkoff; that Voluntary Pledge cards be obtained from contributors; and that, as before, the monies of the Voluntary Political Fund be kept separate and apart

from the funds of the Local (Tr. 1839-44, 1849, 1870, 1900; A. 1020-24, 1027, 1041, 1061).

Therefore on that very day, November 25, 1962, the Executive Board met again and, as reflected by the minutes (G. Exh. 105, Tr. 1799-1802; A. 993-95), petitioner Lawler "explained that on the advice of our lawyers for Local Union 562 * * * that in their opinion if the members of Local Union 562 voted and adopted a 4 per cent dues and assessment check-off system, and then took one and one-half per cent from the total 4 per cent for our Voluntary and Defense Fund, we would be in conflict with the Landrum-Griffin Law." Consequently it was recommended that at the next regular meeting, on December 12, 1962 the membership vote instead on a two and one-half per cent assessment plus $3.50 per month dues, to be negotiated for in the new contract: "All of this money shall remain in the Local Union's treasury for the purpose of operating the Local Union." Also, the Board decided that "Starting on the 1st of January, 1963, your Secretary will only collect from dues paying members of Local Union 562."

On December 12, 1962, the membership of Local 562 met. Attorney Craig and his partner, attorney Wiley, were present and directed the meeting. Numerous recommendations for the impending contract negotiations were favorably voted on, including the above. The Executive Board report of its meeting of November 25, 1962 was read and adopted. Defendant Lawler "read about the two and one-half per cent and $3.50 dues checkoff system and will do everything possible to have it enjoined in our new agreement." He "said we will vote tonight but it will not go into effect until it is accepted by the contractors" (Tr. 1803-1806; A. 996-98).

Written notices were also immediately sent to all Journeymen Construction Pipefitters who were working on jobs under the jurisdiction of Local 562 for a meeting of

Contributors to the Voluntary Political Fund to be held on the following Sunday, December 16, 1962 (D. Exh. MM).[6]

On the following Sunday, December 16, 1962, the contributors to the Voluntary Political Fund, both members and non-members of the Local, met, pursuant to such written notice. These contributors voted to recommend that members contribute $1.00 per day and non-members $1.50 per day to the Political Fund, thus increasing the contribution of members from fifty cents to $1.00 per day and non-members from 50 cents to $1.50 per day, all to begin January 1, 1963. Those present, both members and non-members were also told that the Local would no longer collect the 50 cents per day assessments dues from non-members (D. Exh. MM, Tr. 1808-10; A. 999-1001).[7]

Concurrent with these actions and recommendations, attorney Craig further recommended that, before accepting any more contributions to the Voluntary Fund, the Fund obtain a signed voluntary contribution pledge card, which attorney Craig designed (Tr. 1810-11, 1873, 1900-01; A. 1001, 1043, 1061-62). It reads as follows (D. Exh. A, Tr. 1815; A. 1004).

"VOLUNTARY CONTRIBUTION AGREEMENT

"I, the undersigned, of my own free will and accord, desire to make regular contributions to the Political, Education, Legislative, Charity and Defense Fund

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[6] "Dear Sir:

There will be a Meeting concerning POLITICAL ACTION SUNDAY, DECEMBER 16, 1962 at 3 P.M. at the ELECTRICIAN'S HALL—5850 Elizabeth Ave. Take notice of new location. Refreshments will be served. VERY IMPORTANT . . . Please be present. George Seaton, John L. Lawler".

[7] Meetings of the Voluntary Political Fund were usually held on Sunday, with political candidates present and refreshments served (Tr. 370, 398, 679, 719, 1806-13; A. 172, 189, 322, 348-49, 998, 1003).

which has been established and will be maintained by persons who are members of Local Union No. 562.

"I, therefore, agree to hereafter contribute ..% per 8 hour day to said fund and authorize my contributions to be used and expended by those in charge of the fund, in their sole judgment and discretion, for political, educational, legislative, charity and defense purposes.

"I understand that contributions are voluntary on my part and that I may revoke this agreement by a written notice to that effect mailed to the fund or to persons in charge thereof. I also understand that my contributions are no part of the dues or financial obligations of Local Union No. 562 and that the Union has nothing whatsoever to do with this fund.

Signed .....

Date: .....

Witness: ....."

Attorney Craig testified that he advised the officers of Local 562 that they could legally establish a separate fund, administered and maintained apart from and not commingled with, Union funds, to be used for political purposes (Tr. 1847-48, 1890, 1916-17; A. 1026-27, 1054-55, 1072-73); that money received into said Fund could not be made a condition of employment or retention of employment or of union membership (Tr. 1893, 1905, 1909-10, 1917-18, 1939; A. 1056, 1064-65, 1067, 1073, 1087); that the Local could solicit money for said Fund (Tr. 1899-1900; A. 1061); that the contributors should first sign a pledge card showing that the contributions were going into the separate political (including other activities) Fund and were voluntary (Tr. 1899-1900, 1925; A. 1061, 1078); that the contributions could be collected in any manner, including soliciting and collecting on the job site by Union stewards and job foremen or other Union officers or men,

when a man reported for work (Tr. 1904-05, 1909, 1913-1915; A. 1064, 1067, 1070); that contributions could be pledged and collected on a regular systematic formula based on amount of work (Tr. 1930-31; A. 1081-82); and that the Fund could accept contributions from some workers and exclude others (Tr. 1934; A. 1083-84).

In early January, 1963, signed contribution cards were executed by all contributors, both members and non-members working on jobs under the jurisdiction of Local 562 (Tr. 1811, Def. Exhs. U, U-1, U-2; A. 1001). Thereafter, contributions were accepted by the Voluntary Fund from those who desired to contribute, generally at the rate voted by the contributors of $1.00 per 8 hours working day for members and $1.50 per day for non-members (members were being assessed 50 cents per day by the Local itself, until the new contract was signed and check-off of dues and assessments for members at the rate of 2½% began on October 14, 1963) (Tr. 1812-13; A. 1001-02).

The 2½% assessment of member Journeymen Construction Pipefitters amounted to 95 cents for an 8 hour day worked in Zone 1, the St. Louis area. In October, 1963, a meeting was held of the contributors to the Voluntary Fund at which it was voted by the contributors that thereafter contributions to the Fund by non-members be increased to $2.00 per day and remain at $1.00 per day by members (Tr. 1816; A. 1005).

F. **Subsequent Changes in Dues and Contributions to Fund.** The membership increased its working dues assessments, effective January 1, 1966, to 3¾% which, for a journeyman's pay for an 8 hours day worked in Zone 1, amounted to $1.48 (Tr. 1817-19, G. Exh. 106; A. 1006-07). In November, 1965, the contributors to the Voluntary Fund met and voted to decrease the contributions of members from $1.00 per day to 50 cents per day, with non-

members remaining at $2.00 per day,[8] effective January 1, 1966 (Tr. 1822-23; A. 1009).

The rate of recommended contributions to the Voluntary Fund and of assessments by the Local of members remained the same until the date of the trial. After the return of this indictment, prior to the trial, the contributors to the Voluntary Fund, both members and non-members, met, pursuant to written notice, and by a secret ballot voted to continue the Voluntary Fund despite the indictment by a vote of 743 "Yes" and 5 "No". About 200 pipefitter contributors who were not members of Local 562, but worked on jobs under its jurisdiction, were present at this meeting and voted for the continuation of their voluntary contribution to the Fund (with the possible exception of 5) (Tr. 288, 1834; A. 128, 1017).

At its highest peak, working assessments of members of the local were 3¾% of gross pay (or $1.48 per day), in Zone 1 and it was recommended that contributions of 50 cents per day be made by members of the Local to the Voluntary Fund, for a total of about 5% of gross pay (Tr. 1817-19, 1820-21, 1823; A. 1005-07, 1007-08, 1009). It was recommended that non-members working under the jurisdiction of the Local, who could not legally pay working assessments to the Union, contribute $2.00 per 8 hours working day, or about 5% of their gross pay in Zone 1 to the Voluntary Fund (Tr. 1822-23; A. 1009).

G. **Management and Operation of the Voluntary Fund.** There was no evidence that any political contributions or expenditures were made out of the treasury of Local 562

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[8] The total of the dues and dues assessments and contributions to the Voluntary Fund of members always really exceeded the contributions of non-members to the Voluntary Fund due to numerous factors: higher pay in Zones 2 and 3 (rural Missouri) where most non-members worked and resided, wage increases, and higher pay for foremen (Tr. 1819-1832, 1856-1858; A. 1007-16, 1032-33).

which was maintained separate and distinct from the treasury and assets of the Fund (Tr. 260; A. 111). Likewise there was no evidence that any of the dues or assessments of Local 562 were ever paid into the Fund or were ever transferred from the treasury of the Local itself, or in any way commingled with the monies of the Fund (Tr. 178-287; A. 59-128).

During the indictment years, both the Fund and the Local rented and maintained offices in a building which belonged to the Local 562 Welfare Trust, administered by joint labor-management trustees (Tr. 179-80, 186-87, 1766-67; A. 60, 63-4, 971). The Local had three offices on the ground floor on one side of the building, while the Fund had two offices on the other side (Tr. 186; A. 63-4). The Welfare Office occupied the entire second floor (Tr. 187-88; A. 64-5).

Petitioner Lawler was the Director of the Fund until January 1965, and thereafter Petitioner Callanan was the director (Tr. 188, 251-52; A. 65, 102). The Fund also employed an office manager, bookkeeper, and collector who kept records and assisted in collecting the money for the Fund at its offices (Tr. 197-98, 210-12, 230-32, 257-60; A. 70-1, 79-80, 92-3, 109-10). The employee recorded the contributions to the Voluntary Fund in Cash Receipts Ledger Books (Tr. 210-12, 230-32, 257-59; A. 79-80, 92-3, 109-10) (Government Exh. 1-5) and disbursed the money under the direction of the Director of the Fund (Tr. 198-201, 210-12, 230-31, 258; A. 71-3, 79-80, 92-3, 109).

The contributions amounted to $286,029 in 1963, $289,783 in 1964, $415,963 in 1965 and $239,211 in 1966 (Tr. 293; G. Exh. 60; A. 131).

During the indictment period the Voluntary Fund made contributions, all by check, to candidates for Federal Office. In 1964 they totaled $97,347; in 1965, $8,919; and

in 1966, $45,146 (Tr. 294-295; A. 132). All contributions were made to DEMOCRATIC PARTY candidates.[9] Almost every contributor was a Democrat (Tr. 370-71, 962, 643, 679, 717, 738, 936, 997, 817, 1083, 1189, 1216-17, 1224, 1250, 1310; A. 172, 461, 300, 322, 347, 361, 446, 483, 412, 529, 595, 613, 617, 634, 674). No contributor was found who was a Republican.

Some of the contributions were either brought to or mailed to the Fund office by the contributor himself. The majority, however, were received on the job by the Union Steward, who, in turn, took them to the Fund office. In the absence of a steward, the foreman usually acted as the Union Steward, and also performed this task. When the contributions were received by a steward (or foreman), and were delivered by him to the Fund office, they were always accompanied by a printed sheet headed "Pipefitters Voluntary Fund." The sheet listed the names of the contributors, the number of hours they had worked, and the amount of each person's contribution (Tr. 192-93, 206-07; A. 67).

After January 1963 when new Journeymen Construction Pipefitters were employed on jobs under the jurisdiction of Local 562, the Voluntary Fund Cards, which lawyer Craig had designed, were distributed to these men, usually near the beginning of their employment, most often by the union steward, or in the absence of a

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[9] $10,897.38 Sen. Symington; $2,000.00 Dem. Cong. Com.; $35,000 Dem. Nat. Com.; $3,200 Cong. Sullivan; $150 Cong. Candidate McClanahan; $500 Sen. Candidate Harris; $4,000 Cong. Karsten; $5,000 Cong. Ichord; $4,300 Cong. Price; $3,000 Cong. Frazier; $1,000 Sen. Proxmire; $42,000 President Johnson; $2,500 Cong. Bolling; $2,500 Sen. Hart; $2,500 Sen. Carvel; $8,869.05 Sen. Long of Missouri; $3,195.50 Cong. Candidate Zablocki; $1,000 Cong. Candidate Ryan; $1,000 Cong. Candidate Stalbaum; $2,000 Cong. Candidate Race; $10,000 Sen. Douglas; $2,000 Cong. Candidate Fogarty; $1,000 Cong. Candidate Fallon; $1,000 Cong. Candidate Haney; and $1,000 Cong. Candidate Harding (Tr. 305-22; A. 139-50).

steward, by the job foreman (Tr. 342, 381, 409, 498, 627-28, 689, 727, 753, 984-85, 947; A. 154, 179, 196-97, 254, 289, 328-29, 354, 370-71, 474-75, 451).

These cards were signed by all members and non-members who wished to contribute to the Fund (Tr. 1810-11, 1873, 1899-1900; A. 1000-01, 1043, 1060-61). The men who did the collecting and filled out the sheets used varying terminology for the contributions they received, especially for money that was contributed by men for past weeks worked or when a man failed to contribute or delayed his pledged contribution. In a few cases these collectors referred to the contributions as "assessments", "back assessments" and "amount owed" (Tr. 216, 352, 399, 498-99, 633, 673, 710-11, 780, 904; A. 83, 161, 190, 254, 293, 318, 342-43, 387, 425-26). A great deal of effort was exerted by the government at the trial in an attempt to show that these words or designations were indicative that the contributions were in fact not voluntary. But each witness who used such terms testified that the contributions, both received and made, were in fact voluntary. The testimony of these witnesses is summarized in this Statement, *infra*, pp. 29-40, along with the testimony of defense witnesses on the subject of voluntariness of the contributions.

F.B.I. Agent Buckley, an accountant, testified that he had all the Records of the Fund in his possession for about one year[10] and that he found no money contributed to the Fund which was not accounted for in the Books and records of the Fund, if he assumed that the voluntary collection sheets of the stewards and the original entries of cash receipts in the Books made by the Fund employees were accurately recorded (Tr. 231-32, 238, 304; A. 93, 97, 138-39).

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[10] The records were returned to the petitioners shortly before the trial, after the Government had made copies of many of them (Tr. 231-32, 238, 300, 303-04; A. 92-3, 97, 136, 138-39).

Mr. Carroll Shelton, a Certified Public Accountant, the accountant for Local 562, was asked shortly before the trial in 1968 to audit the books and records of the Fund. He had been familiar with the Fund records, and had given advice with respect thereto, since 1964 (Tr. 1465; A. 774-75). He audited the Fund books and records from the period of January 1, 1963 through September 30, 1967, and found all of the money properly accounted for which was reflected on the Voluntary collection sheets as contributed. The money on deposit ($155,128) in the American National Bank and the Southwest Bank represented the difference between the collections and the disbursements, prior to that date (Tr. 1478; A. 784). He testified that time did not permit him to make a personal check with each and all of the contributing employees to undertake to verify the accuracy of the records as to their contributions.

At first an individual card was kept for each contributor at the Fund office, but this was soon discontinued in 1964 (Tr. 201-204, 212, 232, 247-48; A. 73-5, 80, 93-4, 102-03). Thereafter, there was no practical way for anyone, including petitioners, to determine whether the workers were really making their pledged contributions, or part or all of their pledges to the Fund (Tr. 213, 220-21, 233-35, 300-02; A. 81, 85-6, 94-5, 136-37). Indeed, F.B.I. Agent Buckley was unable to determine from the Fund records which were maintained whether all employees were contributing, or whether any particular individual employee was contributing his pledged amounts (Tr. 300-02; A. 136-37).

The Government, over the continual objection of petitioners (Tr. 267, 268, 296, 1246, 1281, 1305, 1345-46, 1457, 1520, 1632, 1668, 1736, 1741, 1761; A. 115-16, 133, 631-32, 655, 671, 696-97, 769-70, 811, 884-85, 908, 950-51, 954, 967), adduced evidence that during the months of June to December, 1966, the contributions to the Voluntary Fund

voted to suspend contributions to it and to make like contributions to the Callanan Gift Fund, pursuant to new pledge cards (Tr. 272, 295-96; A. 118, 132-33), because of petitioner Callanan's distressed financial condition. A total of $144,447.20 was paid into this fund which went as a gift to petitioner Callanan. The contributions to the Callanan Gift Fund were made in the same manner as the contribution to the Voluntary Political Fund (Tr. 446-47; A. 220-21). Sheets which were identified as Callanan Gift Fund sheets (Gov. Ex. No. 101), were admitted into evidence. The money collected was taken to the Union Hall (Tr. 447; A. 221) and turned over to Mr. Edward Steska, who served as a committee of one for the Gift Fund (Tr. 448; A. 222). The payments into the Callanan Gift Fund were about the same consistency as the payments into the Voluntary Political Fund (Tr. 279, 465; A. 123, 233).

H. Testimony of Stewards, Foremen and Contributors to Voluntary Fund as to Voluntariness of Contributions.

1. The Government's evidence. The Government called as witnesses 12 foremen and stewards who had made collections for the Voluntary Fund: Gissing, Williams, Detrich, Endermuhle, O'Laughlin, Stiffler, Marshall, Richardson, Conroy, Seeck, Polito and Collom. (Tr. 337-405, 888, 946, 435, 492, 619, 976, 663, 685, 722, 747; A. 152-94, 415, 450, 213, 250, 284, 469, 312, 326, 351, 367). All of these twelve men had been members of Local 562 longer than the indictment period, most of them from the beginning of the Voluntary Political Fund in 1949 (Tr. 367, 379, 946, 495, 664, 680, 711, 725, 733, 976-77, 436, 466; A. 170, 178, 450, 252, 313, 323, 344, 352, 358, 470, 214, 233). All twelve testified that each of them had always contributed to the Voluntary Political Fund (Tr. 474, 480, 773-74, 1000, 713, 671-72, 659, 508, 369-70, 961; A. 239, 242, 383, 485, 345, 317, 309-10, 260, 172, 460); that no one, including petitioners, had ever put any pressure on them to con-

tribute (Tr. 370, 398, 400, 955-56, 670, 677, 716, 475, 774; A. 172, 189, 190, 456-57, 316, 321, 347, 239, 383-84); and that they had never put any pressure on anyone else, nor had been told to do so by any petitioner or anyone else, to contribute (Tr. 400, 961-62, 506-07, 678-79, 717, 736, 476-77, 738, 935-36, 996-97; A. 190, 460, 259, 322, 347, 359-60, 240, 361, 446, 482-83); that they had never told anyone, nor knew of anyone, who was given less work or denied work or union membership, for failing to contribute (Tr. 961-62, 506-08, 642, 661, 678-79, 735-36, 738, 935-36, 774, 476-77; A. 460, 259, 299, 311, 322, 359-60, 361, 364, 446, 383-84, 240). All of them also testified that although they had given contribution pledge cards to new employees, they had always told such men that contributions were purely voluntary (Tr. 365-66, 393, 398, 953, 496, 501, 505, 680, 704, 715, 737, 738, 895; 756-57, 772, 984, 992-93, 471-72; A. 169, 186-87, 189-90, 455, 253, 256, 258, 322-23, 338-39, 346, 360-61, 372-73, 382, 474-75, 479-80, 236-37); and the men had brought their contributions to them voluntarily each week because they desired to contribute (Tr. 342, 356, 368-69, 378, 394, 399, 400-02, 497, 501, 645-46, 599, 398-400, 752-53, 463-64. A. 154, 163, 171, 177, 187, 190, 190-92, 253, 256, 301, 271, 189-90, 370-71, 231-32). All men who contributed had signed the Voluntary pledge cards (Def. Exhs. U, U-1, U-2). Although most of the men on their jobs had contributed to the Fund, in accordance with the recommendations voted at the meetings of the contributors, these foremen and stewards had heard or knew of employees who did not contribute and were in no way discriminated against (Tr. 358, 367, 403-04, 499-500, 741, 745; A. 164-65, 170, 192-93, 254-55, 362-63, 365-66).

These particular twelve stewards and foremen (except Collom who was the steward at Anheuser-Busch plant where there was no checkoff of dues and assessments) were called by the Government because they had used such words as "owed", "back assessments", or ("assess-

ments'' on the Voluntary Fund collection sheets (Tr. 352, 398-99, 502, 633-34, 673-74, 709-10, 904-05, 780; A. 160-61, 190, 256, 318-19, 342-43, 425-26, 387-88), but each of them explained that he had used such terms, not because any contribution was required, or coerced, but either inadvertently or loosely or from habit stemming from the days when he collected dues and assessments (Tr. 956, 501, 626-27, 634-35, 673-74, 905-06; A. 456-57, 256, 288-89, 294, 318-19, 426-27), or so he could answer the questions of the men as to how much they were behind on their pledges (Tr. 353, 645, 933-35, 645; A. 161-62, 301, 444-46, 301), or to indicate their pledge status (Tr. 399, 677-78, 683, 476; A. 190, 321, 324-25, 240)

COLLUM. Mr. Collum was the steward at Anheuser-Busch Brewery (Tr. 436; A. 214), the only place where members of the Construction Division[11] of Local 562 worked where there was no contract for checkoff of dues and assessments (Tr. 467-68; A. 234). These men were really maintenance men, and the Local had a separate contract with the Brewery. Most of them, however, contributed to the Fund, and their wage scale was the same as other construction pipefitters. Mr. Collum was sometimes called by the Secretary of the Local when men got behind on paying their dues and assessments, but he was never called with respect to contributions to the Voluntary Fund (Tr. 443; A. 218). He retained a copy of the collection sheets for payments of dues and assessments but did not retain such a copy of contributions to the Voluntary Fund because dues and assessments were mandatory (Tr. 476; A. 239-40).[12] He did, however, keep a list of those who

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[11] Members of the Metal Tradesmen Division of Local 562 (factory workers) whose wages were much lower than the construction workers, were not assessed any dues at all by Local 562, nor were they asked to contribute to the Fund (Tr. 968-72; A. 464-67).

[12] See minutes of expulsion of members for non-payments of assessments (Ex. App. 435, 443; Gov. Ex. 106).

were in arrears or ahead of their pledge to the fund, in order to answer questions of the men as to how they stood in the payments of their pledged contributions (Tr. 476; A. 239-40).

Three other men who had worked under the jurisdiction of Local 562, all non-members, also testified in behalf of the Government.

HENDRICKSON. Mr. Hendrickson, a member of pipeliners Local 798, Tulsa, testified that in 1966 he worked for an Oklahoma contractor, laying pipe from Warrensburg, Missouri into Illinois through Louisiana, Missouri (Tr. 806; A. 404). When they reached Columbia, Missouri they entered territory under the jurisdiction of Local 562 (Tr. 806; A. 404). Most of the men were not members of Local 562, and they told their steward, who was a member of the Kansas City Local, that they would not contribute to the Voluntary Fund of Local 562 (Tr. 806-07, 809-10; A. 404-05, 406-07). The workers had already heard of the Voluntary Fund (Tr. 810-11; A. 407). The steward called someone at Local 562 which person told the steward that the workers did not have to contribute to the Voluntary Fund as it was purely voluntary (Tr. 807, 812; A. 405, 408-09). Indeed, Local 562 thereafter turned the entire jurisdiction of the job over to the Kansas City Local and never took jurisdiction of the job at all.[13] (Tr. 809-10; A. 406-07).

A year or so later, in July 1967, this same witness, Mr. Hendrickson, asked the Superintendent of a job (whom he knew) at Centralia, Missouri to employ him (Tr. 797-98; A. 399). He worked on this job from July to November (Tr. 798; A. 399). This job was under the jurisdiction of Local 562 (Tr. 797-98; A. 399). About a week after

[13] Local 562, however, was not legally able to dispense with payments of fringe benefits to the Welfare Trust which went to both members and non-members.

he started to work, the steward (who was not a member of Local 562 but rather a member of the Jefferson City Local) spoke to him about the Voluntary Fund and presented him with a Voluntary card (Tr. 801-804; A. 401-03). The Jefferson City steward told him it was a purely voluntary contribution and that he did not have to contribute (Tr. 802, 812-13; A. 402, 408-09). He signed the card and contributed for two reasons: (1) as a courtesy to Local 562 since he was their guest and (2) the others on the job were contributing (Tr. 802, 805-06; A. 402-404). He understood and knew that the Local 562 Fund was a voluntary political Fund similar to COPE (Committee on Political Education-AFL-CIO) (Tr. 813, 821; A. 409-414). No one ever told him he had to contribute to the Voluntary Fund in order to work (Tr. 816; A. 411). Indeed, there were no members of Local 562 on the job at all (Tr. 817; A. 411), and he never spoke to any member or officer of Local 562 (Tr. 805, 816; A. 403-04, 411).

BAKER. The witness Norman Baker was also a member of pipeliners Local 798, Tulsa (Tr. 584-85; A. 261). Previously he had been a member of Cape Girardeau Local 318 (Tr. 585; A. 262), and had had experience working under the jurisdiction of Local 562 (Tr. 586; A. 262). He had signed a voluntary contribution card on two occasions (Government's Exhibits 112, 113; A. 265, 267). He testified that he entertained an understanding that payments to the Voluntary Fund were necessary in order to work (Tr. 590-99; A. 265-271), which he got from rumors (Tr. 615; A. 282). However, none of the petitioners, nor any officer or steward of Local 562 ever told him that he had to contribute in order to work (Tr. 615; A. 281). He accepted the rumors without inquiry of anyone (Tr. 616; A. 282).

COPELAND. Three Copeland brothers (Edwin, William and Leroy) were members of Cape Girardeau Local 318, and all worked a great deal under the jurisdiction of

Local 562. By February 11, 1964, following the strike by Local 562 in the second half of 1963, all three filed suit against Local 562—Edwin charging before the NLRB discrimination against 31 non-members on the Pea Ridge job during the strike; William charging the same against 5 non-members on the Farmington State Hospital job; and Leroy suing in U.S. District Court alleging discrimination against him by preventing him from being employed during the strike on the Pea Ridge job (Ex. App. 388, 425, Gov. Ex. 105). The charges all resulted from discharges of non-members by non-association contractors during the 1962 strike, and replacing them with members of Local 562.

Government witness Endermuhll, a foreman, testified on direct examination that in 1963 he was the foreman on the McDonnell Aircraft job over a crew of about 100 pipefitters, during part of which time he collected the Voluntary Fund contributions. They were made by everyone on the job except Leroy Copeland, who was not discriminated against in any way because of his failure to contribute (Tr. 499-501; A. 254-56).

Of the three brothers, only William W. Copeland testified. He testified that he was a member of Local 318 of Cape Girardeau, Missouri (Tr. 406; A. 195). He first worked under Local 562 jurisdiction in December 1962 at the Hercules Plant in Louisiana, Missouri (Tr. 406; A. 195). About three days after starting in that job, he was given a voluntary contribution card which he signed (Tr. 408; A. 196). He could not recall who gave it to him (Tr. 408; A. 196). He contributed $1.50 per day to the Fund from December 1962 until April 1963 when that job was completed (Tr. 409-10; A. 196-97).

He testified on direct examination with respect to the time he was given the card as follows (Tr. 408; A. 196):

"Q. Did you sign the card? A. Yes, sir.

"Q. All right. Did you know what it was? A. Yes, sir.

"Q. What was your understanding of what it was? A. That it was to be a voluntary donation for the Pipefitters Political Fund."

He read the card including that part which stated that he could stop his contributions at any time (Tr. 426; A. 207).

On May 1, 1963, he went to work on a Local 562 job at the Farmington State Hospital at Farmington, Missouri where he worked until June 1, 1963 when Local 562 called a strike against the members of the Mechanical Contractors Association (Tr. 411, 426; A. 198, 207-08). The contractor at Farmington was not a member of the Mechanical Contractors' Association and did not stop work, but Copeland was laid off and replaced by members of Local 562 during the strike (Tr. 427; A. 208). His layoff here had nothing to do with contributions to the Voluntary Political Fund (Tr. 430; A. 210).

After working under the jurisdiction of the Jefferson City Local 412 for awhile (Tr. 412; A. 198-99), he again worked under Local 562 jurisdiction for Murphy & Company in St. Louis and Anheuser-Busch Brewery (Tr. 413-14; A. 199). He transferred to Anheuser-Busch about August 1963 (Tr. 414; A. 199). He made contributions to the Fund until October 1963, when the Voluntary Fund payments were increased from $1.50 to $2.00 per day for non-members (Tr. 415-16; A. 201). He was informed of this increase by the steward (Tr. 414-15; A. 200). He testified that he declined to make a payment but his friend, Mr. Scaggs, also a member of Cape Girardeau Local 318 made the payment (Tr. 416; A. 201). Three days later there was a layoff at Anheuser-Busch, which included both the witness and Mr. Scaggs who continued to contribute (Tr. 418, 427, 431; A. 202, 208, 210). No

member of Local 562 was laid off (Tr. 427; A. 208). He was given no reason for the layoff and never inquired (Tr. 418-19; A. 202-03). Moreover, he never again tried to get employment through Local 562 (Tr. 419; A. 203).

The following day, immediately after his layoff, he and his brother filed the charges referred to above with the NLRB against Local 562 for their earlier dismissal at Farmington, and Pea Ridge in June of 1963, during the strike, but he never did file any charges for his layoff at Anheuser-Busch (Tr. 419-28; A. 203-09).

The day following the lay-offs of Copeland and Scaggs at the Brewery, Mr. Scaggs went to work on another Local 562 job (Tr. 432; A. 211), but Copeland never again went to the Hall of Local 562 to ask for work or any other job as did Mr. Skaggs (Tr. 434; A. 212-13).

The witness admitted that he had asserted to various people strong feelings against Local 562 (Tr. 428-29; A. 208-09), and he came forth voluntarily to testify against Local 562 before the grand jury in this case (Tr. 429; A. 209).

2. **The defense evidence.** A total of 77 members of Local 562 or pipefitters who work on jobs under the jurisdiction of Local 562 testified in behalf of the defense (Tr. 1080-1460, 1551-1765; A. 527-772, 832-970). Thirty-two of them either did not contribute to the Voluntary Fund, had never contributed, or did not contribute regularly under the formula voted on by the contributors (Tr. 1100, 1121, 1133, 1141, 1151, 1159, 1162, 1203, 1223, 1254, 1327-28, 1350, 1357, 1372, 1378, 1397, 1431, 1554, 1562, 1569, 1579, 1595, 1601, 1607, 1613, 1617, 1636, 1639, 1646, 1655, 1658-59, 1747; A. 541, 553-54, 561, 566, 572, 576-77, 578-79, 604, 617, 637, 685, 700, 704, 714, 718, 731, 834-35, 840, 844, 850, 861, 865, 869, 872, 875, 887, 889, 894, 900, 902, 958). Some, even foremen, who had worked steadily since the beginning of

the Fund in 1949, had never contributed to the Fund nor been spoken to about not doing so (Tr. 1333, 1100, 1121, 1607; A. 688-89, 541, 553-54, 869). One had never contributed because he was a Republican (Tr. 1607-08; A. 868-69). One foreman had always both refused to make collections for the Fund (Tr. 1103-04; A. 543), and refused to contribute because he was not in favor of some of the candidates supported by the Fund or did not feel he could afford it (Tr. 1103-04; A. 543). Another such foreman did not believe that money spent on politics was helpful to labor (Tr. 1129; A. 558). Others, some foremen, quit giving several years before the trial without being questioned or discriminated against (Tr. 1125-26, 1159, 1199, 1223-24, 1327-28, 1350, 1372-73, 1554, 1569, 1617; A. 556-57, 577, 601, 617, 685, 700, 714-15, 834-35, 844, 875). One foreman quit giving in 1965 because the Fund refused to support him when he ran for the Missouri Senate. He became angry and told Petitioner Callanan that he would no longer contribute. Petitioner Callanan told him to do as he pleased because the Fund was purely voluntary (Tr. 1200, 1203; A. 601-04). Callanan also told another non-contributing member the same thing (Tr. 1227-28; A. 619-20). Another foreman quit contributing because he disagreed with some of the Fund political endorsements (Tr. 1555; A. 835). Others just decided to quit, or had financial problems. The remainder made contributions when they chose to do so. All of these witnesses testified that they had never been discriminated against nor spoken to about not contributing, or not making the recommended contributions. All who had contributed testified that their contributions were purely voluntary (Tr. 1080-1460, 1551-1765; A. 527-772, 832-970).

Shortly after the defense stated its case, the Court stated —concurred in by Government Counsel—that "Of Course, whether it [the Political Fund] is voluntary or not is not the essence of this case * * *" (Tr. 1243; A. 629). As more

and more pipefitters testified that they either did not make contributions to the Fund or their contributions were voluntary, the District Court began to exert pressures to stop the continuation of such testimony. At the end of the fifth day of defense testimony, after about two days of such witnesses, the Court when adjourning at 5:30 p.m., announced that it would begin Court at 8:30 (rather than the usual 9:00) the next morning (Tr. 1762; A. 967).

The next morning, as hundreds of pipefitters were waiting in the corridors to testify, the Court called all counsel into its chambers What occurred in the Court's chambers is reported only in the form of an objection which was made when the Court convened (delayed because of such conference to 10:00 a.m.) as follows (Tr. 1762-65; A. 968-70):

> "Mr. London: May we approach the bench, Your Honor?
>
> (Thereupon the following colloquy ensued among the Court and counsel, at the bench, out of the hearing of the jury:)
>
> Mr. London: If the Court please, in view of the conversation that we had with the Court and counsel for the Government earlier this morning we, counsel for the defendants, have discussed the matter, discussed wherein the Court stated to us that in view of the fact that we had numerous additional witnesses to call of the same type that are members of the Union that have been called over the last two days, and that in view of the fact that these witnesses were numerous, that the Court, although permitting us to call these witnesses, would require that night sessions be held and that Saturday sessions [1,763] be held and that the Court would attempt to make arrangements for additional reporting service, we feel we would like to call these witnesses who would testify, as has some of the other witnesses who have preceded them, that

there was no compulsion for them to contribute to this Fund, that they had attended meetings wherein the rates of contribution were discussed and voted upon by the members, who would testify that all of the contributions to this Fund were voluntary, and that they knew that this Fund meetings and Union meetings, as well as the Fund meeting itself, were separate and apart, although as I indicated we would like to have all of these witnesses, we feel in view of the statement by the Court that it would be physically impossible for us as attorneys to adequately represent these defendants under the circumstances as outlined, and that the defendants would thereby under the conditions set forth be deprived of their right to effective assistance of counsel as guaranteed by the Constitution.

"We further feel that this procedure would deprive the defendants of a fair trial and due process by placing an undue hardship on the jury and burden the jury with the hours of work as has just been indicated. I believe yesterday we examined some thirty-plus witnesses. There are hundreds of more witnesses from this Union, and who have worked under the jurisdiction of this Union, who could be called, but under the circumstances as I have indicated that were explained to us, we think we at this [1,764] time will call no more of these witnesses.

"The Court: I take it, Mr. London, that your witnesses are all ready to testify that they are employees or members of 562, and that they participated in the Voluntary Fund and that their contributors have been voluntary, is that right?

"Mr. London: And an additional thing, Your Honor, some of them are members of 562, some are not.

"The Court: All right, that they are and have worked under the jurisdiction of 562?

"Mr. London: And also, as you indicated, their contributions were voluntary and also that the Fund is separate and apart from the Union itself, and that they have attended these meetings where these matters were voted upon.

"The Court: Well, of course, a great many of these witnesses did not testify about being separate and apart.

"Mr. London: Not every witness, of course, Your Honor, will testify as to exactly the same facts.

"The Court: The Court has no intention of limiting the number of witnesses, although the Court feels by reason of the authority of **Samuels v. United States**, which is reported in 232 Fed. 536, that the Court has the authority to limit it under the circumstances where the witness's testimony is merely going to be cumulative.

"The Court has indicated he has no intention of stopping you. I merely want to put on as many witnesses as can be put on during the course of the day. These jurors are being kept from their businesses, and to the extent that we can, we are going to run as long as we can during the day.

"Now, the Court is not asking you not to put on, and has told you before he had no intention of limiting the numbers of witnesses you put on. So whatever you do, you're doing on your own. The Court is not compelling you to do anything.

"All right, call your next witness.

"Mr. London: One moment.

"Mr. Randall: Under the circumstances we are not going to call any more of that class of witness.

"The Court: It's up to you to call them or not. We are here to hear them, and the jury is here, and the reporter is here, and it is 10:00 o'clock in the morning, and we are ready to go, and let you put on as many as you want."

We submit that the practical effect of the Court's procedure was to stop further pipefitters from testifying with respect to the issue of voluntariness.

I. **Instructions.** Numerous instructions requested by the defendants dealing with the issue of voluntariness were rejected by the Court (Tr. 1961-1980; A. 1096-1100). For example, defendants' refused Instruction BB (Tr. 1968; A. 1098) reads:

> "The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collection of money to be used for making contributions to candidates for federal political office. The law merely prohibits money of a labor union from being used for such purposes. In this connection, money contributed by members of a labor union, voluntarily, for the purpose of being used for political purposes, with knowledge of such purpose is not money of a labor union. Therefore, if you find that contributions made to the Political, Educational, Legislative, Charity and Defense Fund were made by members of Local 562 voluntarily and that they were made by the members for political purposes, then you must find the defendants not guilty."

We have already related that (*supra*, pp. 13-4), over objection, the jury was instructed that the fact that the payments into the Fund may have been made voluntarily by all of the contributors thereto does not, of itself mean that the money so paid into the Fund was not Union money (Tr. 2075; A. 1116), and that, in conformity with the position previously taken by the Court and Government, the jury was instructed that it could find that the Voluntary Fund was a Fund of the Local from any and all facts in evidence, specifying such findings as that the Fund was routinely collected by officials of the Local on the job site; that the payments into the Fund were determined by

a regular formula; that the payments began and terminated with employment on the job; and that moneys from the Fund were used to provide benefits to the Union members and were used for other activities which were permitted to be done by the Local itself (Tr. 2069-73; A. 1111-15). The jury was not given any direction or standards by the Court for determining when a Voluntary Political Fund never commingled with union money, becomes Union Money and its disbursement a Union Expenditure, subject to the proscriptions of Section 610. Instead the jury was allowed full range to make this determination.

J. Proceedings and Decisions of Court of Appeals. On appeal to the Eighth Circuit Court of Appeals, petitioners took the position that they were entitled to an outright reversal of their conviction, rather than a new trial. They maintained that the District Court had improperly construed and applied Section 610, with the result that the Government had not only failed to allege and prove an offense under Section 610, but also that the Section as thus construed and applied by the District Court was unconstitutional. Also, petitioners claimed that the jury had in effect acquitted them by its special finding.

In the Government's brief in answer to petitioners' brief before the Eighth Circuit in panel, and in oral argument there, the Government seemingly changed its position as to the interpretation of the statute, and took the position that the contributions of the Fund by the members and non-members of Local 562 had been made **involuntarily**; and now conceded that a Union acting through its officers, agents and members may form a political organization parallel to the Union and use Union personnel to solicit and spend direct voluntary contributions for Federal elections; and indeed that COPE and countless other labor political action groups had been so legally organized and operated.

In the light of this acknowledgment by the Government in its brief and oral argument, and for additional reasons, Judge Heaney ruled that the trial court's instructions were erroneous under the law and that a new trial should be granted in order to avoid facing the grave constitutional questions that had been created in this case by the application and construction of the Statute by the trial Court.

The majority opinion in panel in the Court of Appeals never actually ruled upon the issues as to whether or not the Statute was unconstitutional **as construed and applied by the District Court**, and consequently by the jury in this case. Without noticing the construction and application of Section 610 by the District Court in its instructions, the majority opinion, in ruling on the sufficiency of the evidence, stated that (p. 10; A. 1136): "It would appear to be unrealistic to believe that such a large number of workmen would make such substantial voluntary contributions to be used for political purposes unless they felt that their job security required them to do so."

The majority, in dealing with the First Amendment issue (i. e., constitutionality of the Statute), which it acknowledged to be "substantial and difficult" (A. 1137), ruled that Congress was "attempting to protect the individual union member's right to his own political views and the right to support or not to support them through money contributions." (A. 1138). Thus interpreted, the majority held that Section 610 did not offend the First Amendment rights of labor union members to engage in political association, stating that "Separate voluntary political associations by union members are not in any way proscribed by the statute." (A. 1139). Further, the majority, in dealing with the other difficult constitutional problems, said (A. 1139): "Section 610 only prohibits [working men] from being forced into [political contributions]." Indeed, the majority opinion, like the

Government's brief in the Court of Appeals, is permeated with words and phrases connoting the thought that the contributions to the separate Voluntary Fund, without the jury so finding, were involuntary. Of course, the majority in panel also conceded that there was evidence that a limited number of the workers did not make contributions to the fund and that no reprisals were taken against them (A. 1136). Thus, the majority never held that the contributions were proved to be involuntary.

Thereafter, on August 19, 1970, an unlimited rehearing was granted by the Eighth Circuit Court *en banc*. On August 26, 1970, petitioners wrote the clerk of the Eighth Circuit requesting permission to file a supplemental brief in connection with the rehearing of the case by the Court *en banc*. In doing so, petitioners specifically pointed out: "It is not our intention to rebrief the issues covered in our original brief but rather to deal supplementally with the issue considered by the dissent in the division decision" (A. 1150).

Thereafter, on September 10, 1970, petitioners were informed by letter from the clerk of the Court that such a supplement brief could be filed (A. 1151-52). A supplemental Brief was filed by petitioners raising and briefing the question of the correctness of the trial Court's instructions, and now specifically asking for a new trial. The Government filed a brief in Answer to it, without objecting to the question being heard and ruled on. Three of the seven members of the Court *en banc* ruled that the Statute as construed and applied by the District Court is unconstitutional (A. 1159-78). The other four members of the Court, in its opinion, *sua sponte*, dealt solely with the issue as to whether or not the Court could consider and rule upon this question and held that it could not (A. 1154-59). This particular issue was never briefed by the parties. The majority of four judges *en banc* also did not rule upon the grave constitutional issues that were raised by petitioners in their

original briefs as to whether or not Section 610, as construed and applied by the District Court, was unconstitutional, except to state that the "judgments of conviction and sentences imposed are affirmed for the reasons set out in the panel majority opinion filed June 8, 1970" (A. 1154).

All of the dissenting Judges held that the instructions were prejudicially erroneous (A. 1159-78). Further, Judge Heaney in his dissenting opinion, joined by Judges Lay and Bright, ruled, *inter alia*, that the refusal of the majority to rule on this issue (and thereby avoid the Constitutional questions) was in direct conflict with many decisions of this Court (A. 1159-68). In addition, Judge Lay in his dissenting opinion, joined by Judges Heaney and Bright, held that 1) the trial Court's instructions were in fact attacked as error by petitioners in their original briefs, 2) the Court of Appeals set aside the original submission of the appeal, directed the parties to file supplemental briefs for the benefit of the Court *en banc* and the petitioners specifically questioned the propriety of the instruction in said brief without any objection or claim of abandonment by the government, and 3) in the public interest and to guard against manifest injustice such an obvious error as the instructions presented should be corrected (A. 1168-78).

SUMMARY OF ARGUMENT

I

Section 610, Title 18, U.S.C. prohibits political contributions and expenditures by labor unions. Here, the indictment alleged and the evidence showed that political contributions were made by the Voluntary Political Fund. The indictment charged that the Voluntary Fund was actually a fund of the petitioner union, which was created and maintained as a device to evade the proscriptions of Section 610. The evidence however clearly showed

that the Voluntary Fund was never concealed in the sense that it was hidden from the public and governmental attention, had been in existence for almost twenty years prior to the return of the indictment, and that vast numbers of government officials, from the President of the United States on down, had received contributions therefrom.

The jury was instructed over petitioners' objection, that it could find the petitioners guilty of a violation of the law even if it found that all the contributions to the Voluntary Fund were **voluntarily made** by individual members of the union and other individual pipefitters who worked on jobs under the jurisdiction of the union. The evidence clearly showed that the funds of the Voluntary Fund were never commingled with any union moneys, and that the Fund was a separate political organization or committee. Clearly, the evidence was insufficient to show and establish that the contributions to the Fund were made **involuntarily**, even if that issue had been submitted to the jury (of course, petitioners requested that the issue be submitted). Indeed, the Government abandoned this claim in its requested submission of the case to the jury.

Under the above the evidence was insufficient to prove a violation of Section 610 in the light of the legislative history of Section 610 which shows a clear legislative intent to exclude a union members' political Fund from the orbit of the Statute. The legislative history shows and no one in Congress doubted that labor unions could create organizations which could receive funds from union members and make political contributions, provided the contributions were made by the members **voluntarily** and were **not general dues** of the union itself.

II

The money contributed to the federal candidates was in no legal or real sense the money of the Union, Local 562. Confronted with the legislative history that Congress in-

tended to permit some such Union Political Fund which had an intimate union connection with the administration of such a fund, the government attempted to prove that petitioners had transferred ownership of the monies for the political contributions from the Voluntary Fund to the Local Union. Thus, the indictment alleged that the Fund was established for the purpose of "concealing" that the Union was making political contributions. Such an allegation is completely false and almost fraudulent, since the Fund had existed 20 years with full governmental and public attention and knowledge in all details, and high government officials repeatedly accepted the contributions.

The Trial Court instructed the jury at government request (and over petitioners' objections) that the fact that contributions to the Fund were voluntary, does not mean that the money was not union money. On appeal the government changed its position on the issue of voluntariness, and argued that unions acting through its officers may legally form a political organization and solicit voluntary contributions. Also, in the government's Brief in Opposition it argues that this case "does not involve a voluntary organization" (p. 13). Thus, we submit that the government has effectively now conceded that only the issue of voluntariness could conceivably convert the Fund's money into union ownership. The Trial Court thus erred in refusing to submit this issue to the jury.

If this Fund is found violative of the Statute, without determining the issue of voluntariness, all labor funds in America violate the Statute, as well as many corporate funds and other procedures for political contributions by corporate officers and wealthy individuals.

III

The Courts below construed Section 610 as prohibiting officers, agents and members of a union from forming a parallel political organization and utilizing the union lead-

ers, officers and agents in such political organization, in obtaining, pooling and expending of direct voluntary contributions for political purposes.* To prohibit union members from voluntarily pooling their financial resources in political association, in an organization separate from the union, through their chosen leaders, raises more serious constitutional doubts than the political expenditures made by the union itself in **United States v. C.I.O.**, 335 U.S. 106, 68 S.Ct. 1349 (1948). See also **United States v. U.A.W.**, 352 U.S. 567, 77 S.Ct. 529 (1957), where three Justices held the statute to be unconstitutional, with the majority not resolving that issue.

First Amendment rights enjoy a preferred status in our constitutional scheme (**New York Times Co. v. Sullivan**, 376 U.S. 254, 269-270, 84 S.Ct. 710 (1964), and the most fundamental of all such First Amendment rights is the right to political association and expression. **Sweezy v. New Hampshire**, 354 U.S. 234, 77 S.Ct. 1203 (1957); **N.A.A.C.P. v. Button**, 371 U.S. 415, 430, 83 S.Ct. 328 (1962). Restraints on freedom of association in the area of political discussion would result in evils far more serious than any which the restraints seek to prevent. **Stromberg v. California**, 283 U.S. 359, 369, 51 S.Ct. 532 (1931).

If Section 610 is construed to apply to the Voluntary Fund, then it is unconstitutional as limiting the First Amendment rights of union members to associate in political expression.

IV

Section 610, as construed and applied by the Courts below and on its face, is so vague, indefinite and uncertain as to deprive petitioners of due process of law and fails

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* The government on appeal has argued that the contributions were not **voluntary**, but at **trial** the government urged and the Trial Court agreed, that voluntariness was not the decisive issue in the case.

to provide a reasonably ascertainable standard of guilt in violation of the Fifth and Sixth Amendments.

The Statute is so vague that experienced federal appellate Judges disagree on the proper construction of the Statute. In light of this the petitioners should not be incarcerated and held accountable for doing something that they did on advice of counsel and where experienced judges admittedly reach different conclusions as to what can or can not legally be done. Surely, the Statute should be held void as unconstitutionally vague and indefinite.

V

The Statute as construed and applied by the Court below and on its face arbitrarily discriminates against labor unions, its members and persons of the laboring class, depriving them of liberty and property without due process of law in violation of the Fifth Amendment. Further, the Statute as applied by the Court below, also unlawfully abridges the rights of petitioners and all union members to vote and to choose their senators and representatives in Congress, as guaranteed by Article I, Section 2 of the Seventeenth Amendment to the Constitution of the United States. Such application by the Court is discriminatory and requires union members to discard their only means of political expression involving their livelihood, their union.

VI

The jury specifically found that "a wilful violation of Section 610, Title 18, United States Code, was not contemplated" by any of the petitioners. The proscriptions contained and set forth in Section 610 are *malum prohibitum*. Petitioners submit that where the substantive offense is *malum prohibitum*, criminal conspiracy (18 U.S.C., § 371) requires knowledge that the conduct that is the

purpose of the conspiracy is unlawful (or is to be effected by unlawful means) and a definite and specific intent to do that which has been declared unlawful. Therefore, we submit that the special verdict returned by the jury (i.e., wilful violation not contemplated) was in effect an acquittal.

VII

The majority of the Court of Appeals *en banc sua sponte* refused to rule on the question as to whether the trial Court's instructions were incorrect. The majority held that it could not legally rule, even though petitioners objected to the instructions at trial, because petitioners prayed for reversal and discharge in their original brief filed in that Court and did not pray for a new trial.

The majority's holding that the instruction was not raised as error by petitioners in their original brief is incorrect and completely ignores the heart of the matter being litigated (i.e. whether involuntariness was a necessary element in this case). Further, since Section 610 does not proscribe use of voluntary funds, the majority passed on the constitutionality of the Statute without giving the Statute its intended construction. Constitutional validity of legislative action should not be passed upon until the conflict is unavoidable.

Further, the Court of Appeals set aside the original submission of the appeal, directed the parties to file supplemental briefs for the benefit of the Court *en banc*, after petitioners specifically requested permission to argue that the instruction was erroneous. The government filed a brief on the merits on the issue and never claimed abandonment. To guard against manifest injustice, such obvious error should be corrected, especially where the Court granted the request to brief the issue, petitioners did so and the government did not object.

ARGUMENT

I

All Courts Below Improperly Construed Section 610, Title 18, U.S.C. in Holding That the Indictment Alleged an Offense and the Evidence Was Sufficient to Sustain a Conviction for Conspiracy to Violate Section 610, Title 18, United States Code, Where Both the Indictment and Evidence Showed That the Funds Expended for Political Purposes Were Not Funds of the Union and Were Never Commingled With the Union Funds, But Instead Were Funds of a Political Organization or Committee Which Received Its Funds From Direct Voluntary Contributions From Individual Members of the Union and Other Individual Pipefitters Who Worked on Jobs Under the Jurisdiction of the Union.

Section 610, Title 18, U.S.C. provides in pertinent part as follows:

> "It is unlawful for * * * any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in * * * Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, * * *.
>
> "Every * * * labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every * * * officer of any labor organization, who consents to any contribution or expenditure by the * * * labor organization, * * * shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more

than $10,000 or imprisoned not more than two years, or both.

"For the purpose of this section 'labor organization' means any organization of any kind * * * which exist for the purpose, * * * of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work."

By its language, Section 610 only prohibits political contributions and expenditures by labor unions. Of course, the political contributions were not really made by Local 562, and no contention was ever so made. This is apparent even from the indictment. What the indictment alleges, and the Government has always claimed, is that the Voluntary Political, etc. Fund was really a fund of Local 562, and was created and maintained as a device to evade the proscriptions of Section 610. In fact, however, the Political Fund was never concealed in the sense that it was hidden from public and Governmental attention. It was in existence for almost 20 years prior to the indictment with vast numbers of Government officers, from the President on down, receiving contributions therefrom. Its close association with the Local had to be apparent to all recipients of contributions because the top official of the Local was the Director of the Fund and signed the contribution checks.

It seems to us, therefore, to be a question of law as to whether or not the procedure employed in the instant case was prohibited by Section 610. Indeed, every fact, save one, relied upon by the Government as indicating that it was a device to evade Section 610 were without dispute. The fact in dispute was whether some of the contributions to the Fund were **voluntary**. The jury was instructed that it could find the defendants guilty of a violation of the law even if it found that all contributions to the Fund were **voluntary**. It was undisputed that con-

tributions to the Fund were routinely made at regular intervals at job sites; that they were routinely collected by union stewards, foremen, area foremen, general foremen, or other agents of the union; that they were determined by a formula based upon the amount of hours or overtime hours worked upon a job under the jurisdiction of the union; that they were at one rate for 562 members and at a different rate for members of other unions; that they began, continued and terminated with employment on a job under the jurisdiction of the union; that monies of the Fund were used to provide benefits to union members; that non-members were not charged any dues and assessments, including travel card dues in the amount of eight dollars per month; that monies of the Fund were used in part to promote activities permitted to the union by its Constitution and by-laws; that contributions to the Fund were only requested and received from Journeyman Pipefitters working on jobs under the jurisdiction of Local 562, and not from any other classes of persons or organizations; that expenditures from the Fund were under the control of its director who was also the principal officer of the union; and that records used in the collection of the contributions to the Fund were similar to those employed from time to time by the union in the collection of its regular dues and assessments.

These were the items, and all of them, which the Government asked the Court to instruct the jury to consider to determine whether the Fund was in fact monies of the union and a device to evade the law. As we have set forth in the Statement, the Court, at the request of the defendants, added items 10 through 17 to the instruction, all relating to voluntariness, except one, the fact that the monies of the Fund were kept separate from the monies of the union, also a fact not in dispute.

Before further discussion of the statute, we submit that the evidence was insufficient to show and establish that the

contributions to the Fund were made involuntarily—even if that issue had been submitted to the jury. The fact that the Government abandoned this issue in its requested submission of the case to the jury is indicative of the tenuousness of its proof that the contributions to the Fund were coerced by the union. The bits of evidence which were stressed in the Court of Appeals, and perhaps may be repeated here, evaporate with a reading of each of the witnesses' entire testimony.

The evidence on this issue has been set forth in detail in the Statement, and we shall not undertake to repeat it here. But it seems apparent that what the several judges who have heretofore considered this case have done is to take as evidence of involuntariness the facts that, in their view, the contributions were large and the percentage of contributors great. Indeed, the majority opinion below frankly states this proposition (p. 10):

> "It would appear to be unrealistic to believe that such a large number of workmen would make such substantial voluntary contributions to be used for political purposes unless they felt that their job security required them so to do."

The inference thus drawn is erroneous, but a natural one for those inexperienced with construction union men. To construction union workers, who move from employer to employer without any company identification, the union constitutes many things that to others are divided. It is not just their representative in dealing with employers concerning grievances, wages, etc.; it is, indeed, also the source of their employment and the source of their pensions, sick, vacation and other fringe benefits. Unlike other workers, the construction union represents to them both company-employer and union. It is all they have to look to for existence and security. Here, Local 562 was as beneficial to the members of the rural locals as

to its own members for they shared equally with members both in wages and fringe benefits. Certainly, the inference stated in the majority opinion below, which is quoted above, was dispelled by the contributors themselves when they met, both members and non-members, after the indictment was returned and voted by secret ballot to continue their contributions in the same amount by a vote of 743 to 5.

Certainly, the evidence was insufficient to prove a violation of Section 610 in the light of the legislative history of Section 610 which shows a clear legislative intent to exclude a union members' political Fund from the orbit of Section 610.[14]

Before relating the legislative declarations as to the scope of Section 610, we briefly state the history of the statutes which are predecessors to Section 610. In 1907 Congress outlawed political **money contributions** by corporations (34 Stat. 864). In 1925, this provision was incorporated in the Corrupt Practices Act, where it was broadened, by changing "money contributions" to "contributions" and by making the receipt of such contribu-

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[14] This is the first case which the Government has ever prosecuted where the money expended for political purposes did not come from union dues. However, the word "expenditures" has been challenged several times. In none of the reported cases was a conviction sustained. In three cases it was held that the political expenditure there involved was not prohibited by the statute. **United States v. CIO**, 335 U.S. 106; 68 S.Ct. 1349 (1948); **United States v. Painters Local Union No. 481**, 172 F.2d 854 (2 Cir., 1949); **United States v. Construction and General Laborers Union No. 264**, 101 F. Supp. 869 (W.D. Mo. 1951). In two cases, although the money expended for political purposes had its source in union dues, the Court found no violation of the statute on some theory of voluntariness. **United States v. Warehouse and Distribution Workers Union Local 688**, 47 L.R.R.M. 2005 (E.D. Mo. 1960); **United States v. Anchorage Central Labor Council**, 193 F.Supp. 504 (D. Alaska 1961). **United States v. UAW-CIO**, 352 U.S. 567, 77 S. Ct. 529 (1957); dealt only with the sufficiency of the indictment, and later resulted in an acquittal.

tions an offense (43 Stat. 1070).[15] During World War II, in 1943, its provisions were broadened for the duration of the War, by the War Labor Disputes Act of 1943 (Smith-Connally Act), to cover labor unions (57 Stat. 167). In 1947, by the Taft-Hartley Act, its provisions were permanently extended to labor unions, and the act was broadened to cover expenditures in connection with Federal elections (now 18 U.S.C. 610).

There is very little legislative history concerning the provision which was inserted in the War Labor Disputes Act of 1943. Mr. Justice Reed, speaking for the Court, summed up what there is, in **United States v. Congress of Industrial Organizations**, 335 U.S. 106, 115, 68 S.Ct. 1349 (1948), as showing that Congress felt "that it was unfair to individual union members to permit the union leadership to make contributions from **general union funds** to a political party which the individual member might oppose." (Emphasis added.) On the Senate floor a proponent of the provision stated that a union member will not "object very gravely to a law that protects him by putting safeguards around the funds that are taken from him as dues." 89 Cong. Rec. 5792, June 12, 1943.

When the statute was made permanent in 1947 as a part of the Taft-Hartley Act, and extended to cover "expenditures", questions were directed to sponsoring Senator Taft, which he answered, on the Senate floor in connection with the Conference Report, as to what constituted an "expenditure" within the meaning of the act. Although there was some disagreement even then as to what was a political "expenditure" under the act, all were in agreement that coverage of the act depended on the source of the funds received and expended in making the political expenditure, that is, whether the money came from general union

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[15] We have found only one reported prosecution under this statute. **United States v. United States Brewers Ass'n**, 239 Fed. 163 (W.D. Pa. 1916).

dues, or was given by union people to a special organization earmarked for political purposes. (93 Cong. Rec. 6437-6441, 6448-49, 6523-24). Most significantly here, no one doubted that labor unions could create political organizations which could receive funds from union members, and make political contributions and expenditures therefrom, provided the contributions were made by the members of the union **directly** to the political organization, and were not **general dues** of the union itself.

At that time the Political Action Committee of the CIO was already in operation, and had made large political contributions, as well as expenditures, in the 1944 elections, which along with other political expenditures and contributions by Labor Unions themselves, had been the subject of a congressional investigation. **Senate Report No. 101,** 79th Cong., 1st session, P. 23 (1945); 93 Cong. Rec. 3586; **H. R. Report No. 293,** 78th Cong., 2d Session (1945). Prior to the 1944 election campaign, the CIO and four international affiliates contributed over $600,000.00 to the PAC which was spent during the campaign on political expenditures rather than contributions. During the campaign PAC also had an individual contributions account and in addition organized the **National Citizens Political Action Committee** to solicit direct contributions from Union members. The two combined collected and spent over $850,000 for political contributions. **Senate Report No. 101,** 79 Cong., 1st Session, P. 23.[16]

In this Report the Republican Minority commented that:

"If the Political Action Committee had been organized on a voluntary basis and obtained its funds

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[16] PAC successor, COPE continued this dual practice in the 1956 election, making political contributions from individual contributions in the amount of $428,000. **Senate Report No. 395, 85 Cong., 1st Sess.,** Special Committee to Investigate Political Activities, Lobbying, and Campaign Contributions, p. 116 (1957).

from voluntary individual contributions from the beginning, there could be no quarrel with its activities or program and in fact both are desirable in a democracy" (p. 24).

Senator Taft repeatedly stated that these political contributions and expenditures by the PAC were perfectly legal. Following are excerpts from the Congressional Record of June 5, 1947, relating to this subject, which conclusively show that Congress did not intend to prescribe the practice employed by the petitioners here.

"Mr. Taft: No; I said that union funds could not be used for that purpose. * * *

"* * * The PAC is a separate organization which raises its own funds for political purposes, and does so perfectly properly. The Smith-Connally Act prohibited the making of contributions by unions to the PAC, yet those unions took the position that they could use their funds for the publication of pamphlets for or against candidates throughout that election, and they evaded the entire law by saying that was not a contribution—not even an indirect contribution—to the candidates who received the benefit of that procedure. That is what this provision of the House bill is intended to reach, if it be agreed to" (93 Cong. Rec. 6437).

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"Mr. Taft: * * * Such an association [National Manufacturers Association] could receive money by direct contributions from individual members, just as the **CIO-PAC can properly operate as a political organization, raising its funds from individual members.** In the same way the National Manufacturers Association could do the same thing. But no corporation could contribute to the National Manufacturers Asso-

ciation, and no labor union could contribute to the PAC" (93 Cong. Rec. 6438). (Emphasis added.)

* * * * * * * *

"Mr. Taft: * * * As to the association [National Association of Manufacturers] itself, it seems to me the conditions are exactly parallel, both as to corporations and labor organizations. Such an association receiving corporation funds and using them in an election would violate the law, in my opinion, exactly as the PAC, if it got its fund from labor unions, would violate the law. If the labor people should desire to set up a political organization and obtain **direct** contributions for it, there would be nothing unlawful in that. If the National Association of Manufacturers, we will say, wanted to obtain individual contributions for a series of advertisements, and if it, itself, were not a corporation, then, just as in the case of PAC, it could take an active part in a political campaign. But the prohibition is against a labor organization or a corporation participating in an election either by a contribution to somebody else or by direct expenditure of its own funds. That has been understood to be the law of corporations for many years, and until labor organizations were placed under the terms of the Smith-Connally Act, no one supposed that corporations could make direct expenditures without it being considered a contribution. But after the labor organizations were included, that question was raised. In order that it might be finally resolved in this bill, we made it perfectly clear that it covers either a contribution to somebody else or an expenditure of one's own funds for the same purpose, in connection with an election" (93 Cong. Rec. 6439). (Emphasis added.)

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"Mr. Magnuson: Mr. President, if the Senator will yield, let me ask him another question. All the funds of labor unions come from dues paid by their members. All the activities of the unions are based upon expenditure of funds provided by dues. That money is in the union's treasury. If the pending bill should become law it would mean that all labor organs which are now in existence would, from now on, be prohibited from participating in a campaign, favoring a candidate, mentioning his name, or endorsing him for public office?

"Mr. Taft: No; I do not think it means that. The union can issue a newspaper, and can charge the members for the newspaper, that is, the members who buy copies of the newspaper, and the union can put such matters in the newspaper if it wants to. The union can separate the payment of dues from the payment for a newspaper if its members are willing to do so, that is, if the members are willing to subscribe to that kind of a newspaper. I presume the members would be willing to do so. A union can publish such a newspaper, **or unions can do as was done last year, organize something like the PAC, a political organization, and receive direct contributions,** just so long as members of the union **know** what they are contributing to, and the **dues** which they pay into the union treasury **are not** used for such a purpose.

"Mr. Magnuson: I think all union members know that a part of their dues in these cases go for the publication of some labor organ.

"Mr. Taft: Yes. How fair is it? We will assume that 60 percent of a union's employees are for a Republican candidate and 40 percent are for a Democratic candidate. Does the Senator think the union members should be forced to contribute, without being asked to do so specifically, and without having a right

to withdraw their payments, to the election of someone whom they do not favor? Assume the paper favors a Democratic candidate whom they oppose or a Republican candidate whom they oppose. Why should they be forced to contribute money for the election of someone to whose election they are opposed? If they are asked to **contribute directly** to the support of a newspaper or **to the support of a labor political organization,** they know what their money is to be used for and presumably approve it. From such contribution the organization can spend all the money it wants to with respect to such matters. **But the prohibition is against labor unions using their members' dues for political purposes,** * * * and perhaps in violation of the wishes of many of its [members]" (93 Cong. Rec. 6440). (Emphasis added.)

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"Mr. Magnuson: Would the Anti-Saloon League, for example, be prohibited from issuing pamphlets against a political candidate?

"Mr. Taft: As I understand, the league would probably receive contributions from individuals, and it would be like the PAC or any other organization which was organized for political purposes" (93 Cong. Rec. 6440).

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"Mr. Taft: Yes, and it is my opinion. The same thing is true, let us say, of the PAC, if the PAC collects funds from labor unions, rather than from individuals.

"Mr. Kilgore: Yes.

"Mr. Taft: The PAC has ordinarily collected its funds from individuals.

"Mr. Kilgore: Yes" (93 Cong. Rec. 6447).

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"Mr. Ellender: May I say to the Senator from Florida it is only in the event that union funds are used for political contributions that a union becomes liable. Mr. Green can talk all he wants to, if he pays for his own time or if the members of the union desire to make individual contributions for such a purpose" (93 Cong. Rec. 6522).

No one doubted that a union could establish a political organization for the purpose of receiving ear-marked political monies directly from union members as was done by Local 562. This practice has continued since the enactment of Section 610. Twelve National Labor Political Committees spent about 2 Million Dollars on the 1960 election campaign, Alexander, **Financing the 1960 Election** (Contained in **Studies in Money in Politics**, p. 420, 1962). Mr. Justice Frankfurter stated in **International Association of Machinists v. Street**, 367 U.S. 740, 813, 81 S. Ct. 1784 (1961), that COPE had spent $1,681,990.42 during the last three fiscal years on political matters.

Commentators have interpreted Senator Taft's remarks as follows:

"By this expression of intent Senator Taft indicated that unions could organize separate associations as the CIO had already done with its Political Action Committee and the AFL-CIO later did with its Committee on Political Education. The test was that these separate associations must be supported solely by voluntary contributions with no use of any union member's dues. If money from dues was used, it would be violation of the statute." **Comment**, 46 Marquette Law Rev. 364, 366 (1963).

"One of the main reasons Congress passed the 1947 amendment to the FCPA was to protect the rights of those union members who find themselves in the minority on a given political issue. In line with

this purpose, all the speakers taking part in the debate on the act agreed that the validity of a political expenditure was to be tested by the source of the funds. Voluntary donations were to be available for any use desired." Clover, **Political Contributions by Labor Unions**, 40 Texas Law Rev. 665, 670 (1962).

When the Supreme Court, in **United States v. C.I.O.**, supra, 335 U.S. 106, 68 S. Ct. 1349 (1948), gave the word "expenditures" a narrow construction, in holding the indictment insufficient to state an offense, the dissent, who found the statute to be unconstitutional, stated Senator Taft's interpretation of the statute as follows (335 U.S. at 135-138):

"The discussion ranged around a great variety of possible specific applications, with concentration upon both the scope and the validity of the provision. The Senate sponsor responded to a flood of inquiries with candor and so far as possible with precision and certainty concerning particular situations under his view of the section's criterion, although in numerous instances he was equally candid in stating doubt or disability to give positive opinions, at times in the absence of further facts.

"What is most significant for the question of coverage, however, and for the Court's construction in this case, is the fact that in making his responses to the numerous and varied inquiries he tested coverage invariably or nearly so by applying the very criterion the Court now discards, namely, the source of the funds received and expended in making the political publication.

"That is, in his view that the primary purpose of the amendment was 'minority protection,' the line drawn by the section was between expenditure of funds received by the union expressly for the purpose

of the publication and earmarked for that purpose and, on the other hand, expending funds not so limited by the person or source supplying them. There was strong opposition to the provision and spirited exchange between proponents and critics of the measure concerning its wisdom and its constitutionality. But there was no disagreement among them that the sponsor's test was the intended criterion. * * *"

It is clear that Congress in enacting Section 610, not only was sensitive to the constitutional implications of the statute, but also was aware of the need for labor unions to participate in politics, so long as the dues of a dissenting minority were excluded. Although the Republicans were in control of Congress, they needed the help of Democrats to pass the **Taft-Hartley Act** over the President's veto. 93 Cong Rec. 7488. They readily gave strong assurances to doubting Democrats that union members could continue to spend money in politics, and intended that they could do so, through their chosen leaders by forming parallel political organizations to obtain and expend direct voluntary contributions for political purposes.

The impact of unorganized individuals of ordinary means on politics is very little, which necessitates association and central direction. Unions, which are associations of working men with common interests, have been political active in varying degrees since their formation. Unions have influenced social and economic reform both in the corporate plant and in the governmental process. Political participation was necessary for union birth and is still essential to union survival. **Machinists v. Street**, supra, 367 U.S. 740, 812-816, 81 S. Ct. 1784 (1961, Frankfurter dissent); **United States v. C.I.O.**, supra, 335 U.S. 106, 144, 68 S. Ct. 1349 (1948, Rutledge concurring). Now that unions have obtained legal standing, corporations and business men exhibit concern for the union member who is a political dissenter. They assert an interest in the right-to-

work laws, posing as protectors of individualism, whereas in reality they are primarily concerned with their own self interest. See **Labor in America**, Ch. XIV, Labor in Retreat, by Foster Reah Dulles (1949). If unions are to survive, they must counteract the political influence of their economic enemies. As Mr. Justice Frankfurter stated in **Machinists v. Street**, supra, at 814-815: "It is not true in life that political protection is irrelevant to, and insulated from, economic interests. * * * Neither is it true for labor."

Corporate growth today is even greater than union growth. Though with imperfections, the union is a more democratic institution than the corporation dominated by a few major stockholders controlling the board of directors. On the other hand, most union leaders are democratically elected and the unsatisfactory can be removed from office. In our democratic government, organized associations with conflicting interests strive to further the cause they endorse. Their ability to do so today depends largely on the extent of their financial ability, for political success stems largely from the mass medias of communication which costs more and more money. Employer, professional and other associations are active politically and encourage employee and member involvement in politics. Many professional associations, including integrated Bar Associations, are active in politics, yet are in no way controlled by law and spend the money of minority interests without their consent. **Lathrop v. Donohue**, 367 U.S. 820, 81 S.Ct. 1826 (1961). Even churches are active in politics. More recently the charitable foundations, endowed by corporations and wealthy individuals, have become active in politics. These non-profit organizations are politically influential, particularly since the foundation executives are most often chosen from corporate and other employer groups. **Unions and Federal Elections**, 12 St. Louis Univ. Law J. 358, 360, 362.

The Chairman of the Democratic National Committee testified that a National Party spends more than 15 million dollars on a presidential campaign (Tr. 887). In 1964 the cost of running for all public offices was about $200 million. Cummings, **The National Election of 1964**, 158 (1966). The 1964 Senatoral race in New York between Kennedy and Keating cost four million dollars.

During the 1956 presidential campaign, 12 families contributed over one million dollars—more than all unions combined. Twenty-nine large oil companies contributed $344,097 to the Eisenhower campaign while 37 advertising agencies' executives donated $51,000, and 47 underwriters gave $235,000. In 1964 the American Medical Association contributed $100,000 to the Goldwater campaign. Kovarsky, **Unions and Federal Elections**, St. Louis Univ. Law J. 358, 364 and authorities there cited; McKean, **Party and Pressure Politics**, 349-50 (1949); Alexander, **Financing the 1960 Election** (contained in **Studies in Money in Politics**), p. 61 (1962).

Political participation is an extension of other services rendered by unions. Unions frequently provide housing, medical care, education, legal aid (See **Bhd. R. R. Trainmen v. Virginia Bar**, 377 U.S. 1, 84 S.Ct. 1113 (1964); **United Mine Workers v. Illinois Bar**, 389 U.S. 217, 88 S.Ct. 353 (1967)), and other similar things to their members. Union members are not inclined individually to be politically active and their principal contribution to politics consists of donations to union organizations for political activity. Indeed, a union leader cannot ignore politics and retain his position, for the rank and file member finds that union leaders participating in political activities are more effective than those that do not. Money is essential to the political scene.

Moreover, candidates for office are usually professionals, proprietors, managerial employes, small businessmen,

or extremely wealthy men, and very few are wage-earners. This makes it essential that union leaders remain in politics if the political welfare of wage-earners is not to suffer. For few, if any, in Congress have wage-earning backgrounds. Yet background influences everyone's thinking. Thus, there is a natural opposition in Congress, because of its composition, to labor goals. Also, party professionals and leaders really select the candidates, and money is a controlling factor in politics. Those who control the financial purse help to name the candidates. Without group money, the goals of labor are lost.

Another important necessity for union leaders and members to participate in politics is the manner in which a newspaper can assassinate a candidate, a labor union or leader, or even a political party, whose views or platforms coincides with that of the unions or wage-earners. The vast number of newspaper clippings of stories concerning the petitioners over a three-year period which were produced on the pre-trial motions in the instant case clearly indicate how that can occur. Although most newspapers claim political independence, they usually back candidates unfriendly to labor and labor causes.

We submit that newspaper coverage has been unfair to unions by emphasizing strikes, violence, featherbedding, jurisdictional disputes, secondary boycotts, racial discrimination, and misdeeds by a few union officials. On the other hand, constructive union activity, such as that provided by the Voluntary Fund, is ignored by newspapers. To counteract the attitudes of the press, union leaders must enter the political field to protect the interests and goals of union members, and must spend group money on candidates and causes favorable to them.

In addition, newspapers are subsidized by paying less-than-cost postal rates. A few newspaper chains receive as much postal subsidization as major political parties

receive in contributions. Since most major newspapers oppose candidates favorable to unions, at the best unions are not at a great disadvantage. Kovorsky, **Unions and Federal Elections**, 12 St. Louis Univ. Law J. 358, 362-363 (1968).

It is for these reasons, and many more, that Congress in enacting Section 610, protected the right of unions and union members to make political contributions and expenditures by permitting them to form parallel political organizations to the Union itself for the purpose of obtaining funds by direct voluntary contributions from members, and thereby permitting labor people to pool their financial resources and utilize them for political activity, expenditures and contributions, through the regular leaders of their union while at the same time protecting the dues of a possible dissenting minority.[17]

Absent the contention that there was some evidence that some few contributions were made involuntarily (which we deny), all the facts proved showed the Voluntary Political Fund here involved to fall within the conduct which Congress intended indeed to affirmatively approve. The facts heretofore referred to upon which the Government relied at the trial in their requested instruction were either intended by Congress to be permissible or wholly immaterial to Section 610. In addition, not only were the contributors to the Voluntary Fund in the instant case fully aware that their donations were to be used for political purposes, but there really was no evidence that there was any minority among them. The one witness who said he was a Republican testified that he

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[17] In its Brief in Opposition to the Petition for the Writ of Certiorari filed in this Court, the Government concedes, we submit, that that is this case (p. 13): "Thus, although most workers may have willingly made their payments to the Fund, the evidence plainly showed strong institutional pressure by the Union for them to do so, as well as intimate union interconnection with the establishment and administration of the Fund."

had always refused to contribute to the Voluntary Fund (Tr. 1607-8; A. 869). Not even Copeland and Hendrickson claimed that they ever contributed any money to the Fund against their wishes. If that be the purport of Baker's testimony, he clearly testified that he derived his fears which impelled him to contribute solely from rumor, without conveying them to petitioners.

But in any event, assuming that there was some evidence of compulsion, that fact cannot, we submit, convert the monies of the separate Voluntary Fund into union ownership. If so, a corporation would be guilty of making a political contribution if it coerced an officer of the company into making a direct political contribution from his own personal assets, or such a contribution indirectly through some political committee in which some other officer of the corporation might head or participate in. Further, such corporation would also be guilty of making a political contribution if it induced a supplier into making such a political contribution by threats of boycott.

It seems hardly necessary to remind this Court that criminal statutes are strictly construed (**F.C.C. v. American Broadcasting Company**, 374 U.S. 284, 74 S. Ct. 593 (1954); **Smith v. United States**, 360 U.S. 1, 79 S. Ct. 991 (1959); and are never expanded to ensnarl those whose conduct is not clearly declared a crime by the statute.

II

The District Court Prejudicially Erred in Instructing the Jury That It Could Find the Defendants Guilty of Conspiring to Violate Section 610 Even if It Believed That All of the Contributions to the Separate Voluntary Political Fund (From Which All the Political Contributions Were Made) Were Voluntarily Made to the Fund.

Of course, the money contributed to the candidates was in no real or legal sense the money of Local 562. Con-

fronted with the legislative history, that Congress intended to sanction some such Union Political Fund with, we submit, "an intimate Union interconnection with the establishment and administration of the Fund" (Gov't. Br. in Op., p. 13), the Government was confronted with the task of proving somehow that the petitioners had done something to transfer ownership of the monies used for the political contributions from the Fund to the Local—something more than the Government simply asserting that it was a device to evade Section 610. The allegation in the indictment (Paragraph 10) that the Fund was established and maintained for the purpose of concealing that the Local was making political contributions is almost a fraudulent statement by the Government itself, in view of the fact that the Fund had existed for 20 years with full Governmental and public attention and knowledge in minute detail, with Government officials repeatedly continuing to accept contributions therefrom.[18]

It seems to us that what the Government has done ever since this case has reached the appellate stage is talk out of both corners of its mouth on the issue of voluntariness. If the Government concedes, as it ultimately did in the Court of Appeals, that (to quote Judge Heaney citation):

> "The government acknowledges in its brief that a union acting through its officers, agents and members may form a political organization parallel to the union and use union personnel to solicit and spend direct voluntary contributions for federal elections. It concedes that COPE and countless other political action groups have been so organized and operated.[19]

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[18] The statute makes it the same crime to receive as to give.

[19] We have already pointed out that at the trial the Government undertook to submit the case to the jury on exactly the opposite of this proposition, that is, that the jury could find the defendants guilty if it found that all contributions to the Fund were voluntary, and asking the jury to convict on specified facts that established only the quoted proposition (supra, pp. 52-4).

there remains only the issue of voluntariness which could conceivably convert the Fund's money into union ownership, and be the source of a conspiratorial artifice and device.

Not only did the Government, in the Court of Appeals, speak with a forked tongue on this issue, but the Government continues to do so here. It stated in its Brief in Opposition in this Court at p. 13:

> "* * * Thus, although most workers may have **willingly** made their payment to the Fund, the evidence plainly showed strong institutional **pressure**, by the Union for them to do so * * * This case therefore does not involve a **voluntary** organization * * *"[20] (Emphasis added.)

Clearly Congress intended that there could be "intimate Union interconnection with the establishment and administration of a [Political] Fund;" which was the only thing proved.

Indeed, we believe that Congress even intended to permit (much less prohibit) "institutional pressure by the Union" for workers to contribute to a political Fund, so long as such workers "willingly made their payments to the Fund." We deem it well known that few donations (even to the United Fund or March of Dimes) are spontaneous, which the Government now claims is necessary here. (See Govt. Br. in Op., p. 12.) Most donations are preceded with "strong institutional pressure." Even if it were the law, that all political contributions by Union men must be strictly spontaneous and free from any pressure, the court did not even tell the jury that it must find "strong institutional pressure" to convert the Po-

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[20] In this quote, the Government coupled "strong institutional pressure" only with permissible "intimate union interconnection" of the Fund, not "apart from the Union" in concluding that the Fund was an involuntary organization and a claimed violation of the statute.

litical Fund into Union money. Seven instructions on voluntariness were offered by the petitioners and all rejected by the Court (Def. Refused Ins. Nos. S, T, Z, AA, BB, VV, and YY):[21] Instead the Court instructed flatly, at the Government's request, that the "fact that the payments into the Fund may have been made voluntarily by

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[21] "The Court instructs the jury that unless you find beyond a reasonable doubt that contributions made to the Political, Educational, Legislative, Charity and Defense Fund were made by members of Local 562 involuntarily, you must find the defendants not guilty" (Tr. 1964-5; A. 1096).

"It is the position of the defendants that they did not conspire to violate any law of the United States. It is further their position that the Political, Education, Legislative, Charity and Defense Fund was a voluntary fund created by certain Union members of Local 562, after seeking advice of counsel; that the fund was created for political, educational, legislative, charity and defense purposes, and for the promotion of the general welfare of all contributors to the fund; that it was a fund separate and apart from Local 562; and that the contributions to the fund were voluntary. In this connection, the Court instructs the jury, that if you find that the Government has failed to prove beyond a reasonable doubt that contributions were made to the fund involuntarily, you must find the defendants not guilty" (Tr. 1965; A. 1096-97).

"The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collection of money to be used for making contributions to candidates for federal political office. The law merely prohibits labor union money from being used for such purposes. Therefore, if you find that contributions made to the Political, Educational, Legislative, Charity and Defense fund were made by members of Local 562 voluntarily and did not constitute the payment of union dues or labor union money, you must find the defendants not guilty" (Tr. 1967; A. 1097).

"The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collection of money to be used for making contributions to candidates for political office. The law merely prohibits union dues or assessments from being used for such purposes. Therefore if you find that contributions made to the Political Educational Legislative, Charity and Defense Fund were made by members of Local 562 voluntarily and did not constitute the payment of union dues or assessments, you must find the defendants not guilty.

"The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collec-

some or even all of the contributors does not, of itself, mean that the money so paid into the fund was not union money."

Whether or not there may be situations where this proposition might be true (such as outright general unlimited gifts to the union or money accepted directly into the Union treasury,[22] or money embezzled by the union

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tion of money to be used for making contributions to candidates for federal political office. The law merely prohibits money of a labor union from being used for such purposes. In this connection, money contributed by members of a labor union, voluntarily, for the purpose of being used for political purposes with knowledge of such purpose is not money of a labor union. Therefore, if you find that contributions made to the Political Educational, Legislative, Charity and Defense Fund were made by members of Local 562 voluntarily and that they were made by the members for political purposes then you must find the defendants not guilty" (Tr. 1967-68; A. 1097-98).

"The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collection of money to be used for making contributions to candidates for federal political office. The law merely prohibits labor union money from being used for such purposes. Therefore, if you find that contributions made to the Political, Educational, Legislative, Charity and Defense Fund were made by members of Local 562 and did not constitute the payment of union dues or labor union money, you must find the defendants not guilty" (Tr. 1977-8; A. 1099).

"The Court instructs the jury that the law permits labor union members to set up a fund or organization for the collection of money to be used for making contributions to candidates for federal political office. The law merely prohibits money of a labor union from being used for such purposes. In this connection, money contributed by members of a labor union, for the purpose of being used for political purposes, with knowledge of such purpose is not money of a labor union. Therefore, if you find that contributions made to the Political, Educational, Legislative, Charity and Defense Fund were made by members of Local 562 and that they were made by the members for political purposes, then you must find the defendants not guilty" (Tr. 1979; A. 1099-1100).

[22] In an Amicus Curiae Brief filed in the Court of Appeals by the American Federation of Labor and Congress of Industrial Organizations it is stated (at p. ii): that "many labor unions

from the Fund, the issue of voluntariness was the only one proved here by which it could possibly be inferred that the monies of the separate knowledgable Political Fund were converted into union money, with the consequences that the political contributions were made by

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have set up political organizations as an integral subdivision of the union itself. These political arms of organized labor serve a dual function: utilizing dues moneys, they engage in educational activity directed at the union's members, and utilizing voluntary donations, which are kept in separate segregated funds, they channel the flow of contributions and expenditures in connection with federal election." Thus, it is seen these voluntary donations are far more identified with the union than was the Voluntary Fund in the instant case. This is probably due to the fact that the Voluntary Fund here was organized pursuant to the carefully considered advice of competent labor lawyers."

In that Brief, the Federation argued that the voluntariness alone is enough to avoid (not a device to evade) the proscriptions of Section 610, and there is much in the legislative history and judicial pronouncements to support this broad proposition. Although Senator Taft frequently spoke of a separate fund, there is abundant evidence that Senator Taft felt that Union funds themselves could be used for political purposes provided their source were not involuntary union dues. Thus, he repeatedly stated that a union itself could publish a political newspaper provided it was not financed by compelled union dues (93 Cong. Record 6437-6441, 6448-6449, 6523-6524). Although he maintained that money received by the Union itself for such purpose by subscriptions, advertisements or gifts did not constitute union funds within the meaning of the statute, his only explanation for such logic was that such monies were not compelled from union members and did not constitute union dues. But no one doubted that a union could establish a political organization for the purpose of receiving ear-marked political monies directly from union members, as was done by Local 562.

There is also some support for this proposition in the judicial decisions and pronouncements. Two cases have held that there was no violation of Section 610, even when Union dues were used, on some theory of voluntariness: **United States v. Warehouse and Distribution Workers Union Local 688**, 47 L.R.R.M. 2005 (E. D. Mo.); **United States v. Anchorage Central Labor Counsel**, 193 F. Supp. 504 (D. Alaska). Also see statements in **United States v. Congress of Industrial Organizations**, 335 U.S. 106, 111, 106, 123; **United States v. Automobile Workers of America** (UAW-CIO), 352 U.S. 567, 584; Cf. **Machinist v. Street**, 367 U.S. 740, 81 S. Ct. 1784 (1961).

the union itself. If there was enough evidence in this case to submit it to the jury at all, the issue of voluntariness was the crucial issue and the essence of the Government's case (see petitioner's objection, Tr. 1956-7; A. 1092-93).

Though redundant, we again quote briefly from Senator Taft:

> ". . . Such an association [National Association of Manufacturers] could receive money by direct contributions from individual members, just as the CIO-PAC can properly operate as a political organization raising its funds from individual members. (93 Con. Rec. 6438.)"
>
> "If the labor people should desire to set up a political organization and obtain direct contributions for it, there would be nothing unlawful in that." (93 Cong. Record 6439.)"
>
> "The **union** can separate the payment of dues from the payment for a newspaper if its members are willing to do so, that is, if the members are willing to subscribe to that kind of newspaper. I presume the members would be willing to do so. A **union** can publish such a newspaper, **or UNIONS can do as was done last year, organize something like the PAC, a political organization, and receive direct contributions,** just so long as members of the union **know** what they are contributing to, and the **dues** which they pay into the union treasury **are not** used for such a purpose." (93 Cong. Record 6440.);
>
> "If [union members] are **asked** to contribute directly to the support of a newspaper or to the support of a labor political organization they know what their money is to be used for and presumably approve it. From such contribution the organization can spend all the money it wants to with respect to

such matters. But the prohibition is against labor unions using their members' dues for political purposes, . . . and perhaps in violation of the wishes of many of its [members]." 93 Cong. Rec. 6440. (All emphasis added.)

Though we have hesitated to do so, it seems to us altogether proper and appropriate to ask both the Government and this Court (which we hope is not considered impertinent) the following question: If the jury had found all the factual issues which the District Court asked the jury to consider in determining whether the fund was in fact a fund of the union in favor of the Government (except voluntariness and separateness), would the Government have proved a device to evade the sanctions of Section 610, rather than a procedure to avoid its proscriptions? These factual issues are set forth heretofore (supra, pp. 52-5), and are accurately summed up by the Government in its Brief in opposition (p. 13) as an "intimate union interconnection with the establishment and administration of the Fund." That the monies of the Fund were kept separate, and never commingled with the Union funds, was proved by the Government, as well as the defense. Indeed, the indictment so alleges.

If the answer to the above question is negative, as we believe it must be, then it seems apparent that the issue of voluntariness was critical, and the court erred in instructing the jury that "the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money" (Tr. 2,075; A. 1116). We also believe it is apparent that the Court equally erred in refusing all of petitioners' requested instructions on this issue.

If this Fund can be found violative of the statute (by the simple device of calling it an artifice to conceal), with-

out the jury determining the issue of voluntariness, all labor funds in America violate the statute, as well as many corporate funds, and other procedures for political contribution by corporate officers and wealthy individuals. We do not believe the Government can dispute this.

Shaved of compulsion, as the instructions did, the Fund becomes as commonplace as the poltical scene itself. If affirmed, this case could well bring about a complete change in our traditional system of Government based on political parties. It could indeed mean a surrender of our political system to those who are willing to run the risk that their supporters will be victorious; and as victors, engage in selective prosecution of only those who supported the politically defeated, whether by contribution or expenditures.

A Prelude to the Constitutional Issues

Although all the constitutional issues are interlated, they are not identical, and each will be considered and argued separately in this Brief. It seems appropriate, however, to state before beginning separate argument of each of them, that Section 610 as construed and applied below establishes a most dangerous departure from the American tradition of group political activity. As Mr. Justice Rutledge stated with respect to Section 610 in the CIO case, supra, 335 U.S. at 147, "the accepted principal of majority rule which has become a bulwark, indeed perhaps the leading characteristic, of collective activities is rejected in favor of atomized individual rule and action in matters of political advocacy . . ." Manifestly, a nation cannot maintain effective democratic government if every inaffluent individual voter must act alone. It is only through association in groups that he can further his general economic interests and hope to achieve any political effectiveness in our complex modern society. As this Court said in **Sweezy v. New Hampshire**, 354 U.S. 234, at 250:

"Exercise of these basic freedoms [of political expression] in America has traditionally been through the media of political associations." Indeed, it is submitted that our long tradition of group political activity embodies a fundamental constitutional right in and of itself. Congressional power to guard the free exercise of the civil rights of voters cannot be converted into Congressional power substantially to destroy or impair them. Yet, this is the immediate effect of this statute as construed and applied on the freedom of working men and women to protect their interests as union members. It deprives union members of their only organized means of protection of their interests in many of the most important political and economic issues of the day. It reduces the governmental role of common men, who still are so numerous, to scattered ineffectiveness, while at the same time enhancing the power to govern of those who own or control wealth. Contrary to the hopes and desires of those in Congress who enacted Section 610, it is not, as construed and applied in this case, a means of preserving government by and for the people.

III

Section 610, Title 18, U. S. C., as construed and applied by the Courts below, abridges the petitioners' rights as well as the rights of all union members, of freedom of speech, press and assembly and the right to petition the Government for redress of grievances, in violation of the First Amendment of the Constitution of the United States.

In disposing of this case, the courts below construed Section 610 as prohibiting officers, agents and members of a union from forming a parallel political organization and utilizing the union leaders, officers and agents in such political organization, in the obtaining, pooling and expending of direct voluntary contributions for political purposes.

If the convictions now be affirmed, such affirmance can only be viewed by the cautiously law-abiding citizens as standing for that proposition.

Unless the legislative history of Section 610 and judicial precedents are appraised to permit labor people to pool their financial resources and utilize them for political activity, expenditures and contributions, through the regular leaders of their union, in separate organization parallel to the union, the statute would clearly be unconstitutional. Section 610 has been saved once only by a narrow construction of the word "expenditure" with four Supreme Court Justices believing it to be unconstitutional. **United States v. CIO**, 335 U.S. 106. On a second occasion, three Justices held it to be unconstitutional, with the majority not resolving that issue. **United States v. UAW**, 352 U. S. 567.

In the **CIO** case, the Supreme Court said (335 U. S. at 120-21) "it is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgement of the freedoms of the First Amendment. It did not want to pass any legislation that would threaten interferences with the privileges of speech or press or that would undertake to supersede the Constitution. The obligation rests also upon this Court in construing Congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." The Supreme Court later conceded that it "strained words" to avoid the serious constitutional issue presented in the **CIO** case. **United States v. Rumely**, 345 U. S. 41, 47, 73 S. Ct. 543 (1952). The Supreme Court has consistently followed the rule that where a statute is susceptible of two constructions, one raising serious constitutional questions, and the other avoiding them, the Court's duty is to adopt the latter construction. **United States v. CIO**, *supra*, 335 U. S. at 121; **United States v. Rumely**,

supra, **Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.**, 365 U. S. 127, 138, 81 S. Ct. 523 (1961); **Harriman v. Interstate Commerce Commission**, 211 U. S. 407, 422, 29 S. Ct. 115 (1908).

To prohibit union members from voluntarily pooling their financial resources in political association, in an organization separate from the union, through their chosen leaders, would raise more serious constitutional doubts than the political expenditure made by the union itself in the CIO case. First Amendment rights enjoy a preferred status in our constitutional scheme. **New York Times Co. v. Sullivan**, 376 U. S. 254, 269-270, 84 S. Ct. 710 (1964); **Sherbert v. Verner**, 374 U. S. 398, 83 S. Ct. 1790 (1963); **Lamont v. Postmaster General**, 381 U. S. 301, 85 S. Ct. 1493 (1965); **United States v. Carolene Products Company**, 304 U. S. 144, 58 S. Ct. 778 (1938). The most fundamental of all such First Amendment rights is the right of political association and expression. **Sweezy v. New Hampshire**, 354 U. S. 234, 250, 77 S. Ct. 1203 (1957); **N. A. A. C. P. v. Button**, 371 U. S. 415, 430, 83 S. Ct. 328 (1963); **DeJonge v. Oregon**, 299 U. S. 353, 57 S. Ct. 255 (1937); **Machinist v. Street**, 367 U. S. 740, 812-816, 81 S. Ct. 1784 (Frankfurter dissenting) (1961); **United States v. CIO**, *supra*, 335 U. S. at 144 (Rutledge, J., concurring); **Stromberg v. California**, 283 U. S. 359, 369, 51 S. Ct. 532 (1931); **N. A. A. C. P. v. Alabama**, 357 U. S. 449, 78 S. Ct. 1163 (1958); **Watkins v. United States**, 354 U. S. 178, 77 S. Ct. 1173 (1957); **N. A. A. C. P. v. Alabama ex rel. Flowers**, 377 U. S. 288, 84 S. Ct. 1302 (1964); **Thomas v. Collins**, 323 U. S. 516, 65 S. Ct. 315 (1945); **Railroad Trainmen v. Virginia Bar**, 377 U. S. 1, 84 S. Ct. 1113 (1964); **United Mine Workers v. Illinois Bar Ass'n**, 389 U. S. 217, 88 S. Ct. 353 (1967). In **Sweezy** the Court said 354 U. S. at 250):

> "Our form of government is built on the premise that every citizen shall have the right to engage in politi-

cal expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations."

Restraints on freedom of association in the area of political discussion where free political expression is of the greatest importance would result in evils far more serious than any which the restraints seek to prevent.

The Supreme Court has recognized that it is precisely because free political discussion is the prerequisite to effective democratic change that it must receive the highest degree of protection.[23] In **Stromberg v. California,** 283 U. S. 359, 369, 51 S. Ct. 532 (1931), Mr. Chief Justice Hughes stated:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."

This same point was stressed in **DeJonge v. Oregon,** 299 U. S. 353, 365, 57 S. Ct. 255 (1937), where the Court said:

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[23] The central theme which appears to underlie the historic decisions of the Supreme Court in the area of First Amendment rights has been, from the first, the protection afforded the democratic process by the opportunity for free political discussion. Thus, in **Whitney v. California,** 274 U. S. 357, 375, 47 S. Ct. 641 (1927), Mr. Justice Brandeis, concurring for himself and Mr. Justice Holmes, foreshadowed the later decisions of the Supreme Court with the statement "that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that public discussion is a political duty . . . [is] a fundamental principle of the American government."

". . . the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

Because of the deep concern for preserving the freedom of political association and expression as the basis for democratic self-government, statutes which restrict that freedom are subject to the most searching scrutiny. The cases indicate that, in fact, there must be clear affirmative support of a deprivation of these rights, and that this rule amounts almost to a presumption in favor of rights guaranteed by the First Amendment. **Thomas v. Collins**, 323 U.S. 516, 529, 530, 65 S. Ct. 315 (1945); **West Virginia State Board v. Barnette**, 319 U.S. 624, 639, 63 S. Ct. 1178 (1943); **Thornhill v. Alabama**, 310 U. S. 88, 95, 96, 60 S. Ct. 736 (1940); **Cantwell v. Connecticut**, 310 U. S. 296, 311, 60 S. Ct. 900 (1940); **Bridges v. California**, 314 U. S. 252, 262, 263, 62 S. Ct. 190 (1941).

From this premise, that "political association" is a basic freedom protected by the First Amendment, the Supreme Court has found other group activities to be a form of **political** association. Thus, the N. A. A. C. P. Legal Defense and Educational Fund, Inc. was held to be a form of Political Association protected by the First Amendment (as incorporated in the Fourteenth Amendment) against state claims that it constituted solicitation of legal business. **N. A. A. C. P. v. Button**, *supra*, 371 U. S. at 429. "In the context of NAACP objectives, litigation is * * * a means for achieving the lawful objectives of equality of treatment by all government, federal,

state and local, for the members of the Negro community in this country. It is thus a form of political expression." And it "may be the most effective form of political association." (p. 431).

Likewise, other forms of orderly group activity to "achieve legitimate political ends" have been held to be protected by the First Amendment against regulatory assaults by government: to freely associate, without governmental regulation or compelled disclosure, for the advancement of beliefs and ideas [**N. A. A. C. P. v. Alabama**, 357 U. S. 449, 78 S. Ct. 1163 (1958); **N. A. A. C. P. v. Alabama ex rel. Flowers**, 377 U. S. 288, 84 S. Ct. 1302 (1964)]; to organize workers into a union [**Thomas v. Collins**, 323 U. S. 516, 65 S. Ct. 315 (1945)]; to have minority political associations without compelled disclosure thereof (**Sweezy v. New Hampshire**, *supra*); to furnish legal services to union members by the union (**Railroad Trainmen v. Virginia Bar**, *supra*; **UMW v. Illinois Bar Ass'n**, *supra*); to assemble in public for peaceful political action and discussion of minority views [**DeJonge v. Oregon**, *supra*]; to peacefully picket in public places [**Thornhill v. Alabama**, 310 U. S. 88, 60 S. Ct. 736 (1940); **Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.**, 391 U. S. 308, 313, 88 S. Ct. 1601 (1968)].

In argument I, supra, pp. 64-5, we discussed the necessity of union members to participate in politics through the pooling of their joint resources. The Supreme Court has acknowledged this need in **Machinist v. Street**, 367 U. S. 740, 81 S. Ct. 1784 (1961), in holding that railroad unions, where there is a compelled union shop, could spend union dues for political purposes subject to refunding a proportionate share of the dues to objecting members of the union. Also in **Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.**, 365

U. S. 127, 138, 81 S. Ct. 523 (1961), the Supreme Court held that the anti-trust laws did not apply to concerted corporate political action, stating that if the statute were construed to cover political expression through association, serious constitutional issues would be raised.

If the statute is construed to cover the facts alleged in this indictment, as shown by the evidence and as found by the jury under the instructions, it will achieve the elimination of individual members of organized labor from participation in federal elections and to that extent from public affairs. Moreover, this elimination will directly restrain and equally impair the correlative right of the public to hear and be informed through the exercise of labor's rights under the First Amendment. "The right of freedom of speech and press . . . embraces the right to distribute literature . . . and necessarily protects the right to receive it." **Martin v. City of Struthers**, 319 U. S. 141, 143, 63 S. Ct. 862 (1943).

The statute as construed denies individuals rights of voluntary association for it forbids working men to associate and act through their labor leaders in the political field to protect their collective rights. This includes both their rights as union members and the rights of the union which they have joined. Even though the choice of candidates may determine whether those rights will be secured or destroyed, the statute as construed, prohibits union members from protecting and advancing those rights.

Such a candidate may favor repeal of the Taft-Hartley Act, outlawing state Right-to-work laws, higher minimum wages and outlawing discrimination in employment. Yet the Court below held that union members, even through a parallel political organization may not spend jointly a penny in support of such a candidate. The opposing candidate may favor applying the anti-trust laws to unions, a Federal Right-to-Work law, and even a law to prohibit

entirely political activities by Union members. The union members, even through a parallel political organization, may not spend jointly a penny to express its opposition to such a candidate, whether such opposition be by either majority or unanimous action of the members.

From the first, there has been no line of demarcation between the bargaining, educational and political activities of union members. There is a tradition of over 100 years of union political activity in this country.[24] As the Federal Government has increasingly legislated in the field of union activity as well as economic matters, such as wages, hours and conditions of employment which are of the most immediate concern to laboring men both as workers and as union members, the necessity for labor union political activity has correspondingly increased. Today the passage or defeat of any number of bills affecting working men may be of as great importance to union members as even the collective bargaining process itself. Indeed, the very growth of the welfare of working men in this country to their present stature was achieved, at least in part through the pattern of federal labor laws in the 1930s. On the other hand, the restrictions in effect after 1947 have materially curbed further extension of that achievement.

Under these circumstances, the election of candidates to Congress favorable or unfavorable to the interest of laboring men is far from tangential or irrelevant to the purpose of labor union members. Political action, and the public presentation of the union members' views as to who best represents the interest of working men and their associations, is essential to the preservation and advance-

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[24] At the very beginning of the labor movement in the United States unions employed political action as a primary means of advancing the interests of their members. See Ch. III of **Labor in America**, by Foster Rhea Dulles (1949). Labor was emancipated mostly by political action. Ibid., Ch. XI, The Progressive Era; Ch. XVII, Labor and Politics.

ment of their common interests. Political representation of union members' interests as union members and workers is at the very center of the purpose for which labor unions are formed and maintained.

Our political tradition calls for a constantly increasing participation by citizens in discussions leading to the choice of candidates. It also calls for an increasing attempt to reach more citizens with such discussions of issues and candidates. But this statute as construed deprives the petitioner union and its members of this participation. Indeed, the deprivation is so extensive and complete that the statute as construed cannot be viewed as a regulatory device. It amounts to a complete prohibition of group political association by labor union members.

In conclusion, we respectfully submit that if Section 610 is construed to apply to the Voluntary Fund, the statute not only would raise serious constitutional issues, but would clearly be unconstitutional as limiting the First Amendment rights of union members to associate in political expression.

Indeed, we believe that the First Amendment would be violated if Section 610 were construed to apply where voluntary contributions are placed in a union's special bank account, earmarked for political expenditure and there is no **separate** Fund as there was in the instant case. Thus, the controlling factors are that the source of the funds is voluntary contributions by persons who knew the purpose for which the funds will be used, i.e., political expenditures. Of course, in the instant case, the contributions were made to a separate and distinct fund. Query what else petitioners and their attorneys could have done so that the workers could continue to associate in political activities, without their leaders being prosecuted. This question has never been answered by the government, the trial court nor in the majority opinions rendered by the Appellate Court.

IV

18 U.S.C., §610, as Construed and Applied by the Court Below, and on Its Face, Is So Vague, Indefinite and Uncertain as to Deprive Petitioners' of Due Process of Law and Fails to Provide a Reasonably Ascertainable Standard of Guilt in Violation of the Fifth and Sixth Amendments.

On numerous occasions, this Court has declared statutes void as unconstitutionally vague. **United States v. L. Cohen Grocery Co.**, 255 U.S. 81, 41 S. Ct. 298 (1921); **United States v. Cardiff**, 344 U.S. 174, 73 S. Ct. 189 (1952); **Rabeck v. New York**, 391 U.S. 462, 88 S. Ct. 1716 (1968); **Baggett v. Bullitt**, 377 U.S. 360, 84 S. Ct. 1316 (1964); **Connally v. General Construction Co.**, 269 U.S. 385, 46 S. Ct. 126 (1926); **Herndon v. Lowry**, 301 U.S. 242, 57 S. Ct. 732 (1937); **Lanzetta v. New Jersey**, 306 U.S. 451, 59 S. Ct. 618 (1939); **Stromberg v. California**, 283 U.S. 359, 51 S. Ct. 532 (1931); **Winters v. New York**, 333 U.S. 507, 68 S. Ct. 665 (1948); **Palmer v. City of Euclid**, ... U.S. ..., 91 S. Ct. 1563 (1971). The vices inherent in any indefinite enactment imposing criminal sanctions are the dangers of unfair prosecution, because there is no warning of what is criminally proscribed, and the potential deterrence of constitutionally protected conduct, since even legitimate activity will not be undertaken for fear of prosecution. **Cramp v. Board of Pub. Instruction of Orange County, Fla.**, 368 U.S. 278, 283, 82 S. Ct. 275 (1961). Yet these risks will more likely occur, if courts by their interpretation of a statute are permitted to expand language beyond the confines of previous legislative history and judicial precedent. See, **Bouie v. City of Columbia**, 378 U.S. 347, 352, 84 S. Ct. 1697 (1964); **Pierce v. United States**, 314 U.S. 306, 311, 62 S. Ct. 237 (1941); **Wright v. Georgia**, 373 U.S. 284, 83 S. Ct. 1240 (1963); **Smith v. Cahoon**, 283 U.S. 553, 564-65, 51 S. Ct. 582 (1931); **McBoyle v. United States**, 283 U.S. 2527, 51 S. Ct. 340 (1931); Freud, **The**

Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 541 (1941); Note, **The Void for Vagueness Doctrine**, 109 U. Pa. L. Rev. 67, 73-74, N. 3 (1960).

A

The instant case vividly portrays section 610's constitutional infirmity.

Based on the legislative history and all its prior judicial decisions concerning Section 610, the United States District Court for the Eastern District of Missouri in 1960 held that Section 610 did not proscribe contributions to federal candidates, even where such contributions are made out of union funds, so long as the funds are **voluntarily designated for political purposes. United States v. Teamsters Local 688**, 41 L. C. 23,380, 47 L.R.R.M. 2005 (E.D. Mo. 1960). The court stated:

> "To sum up:
>
> (1) I hold that contributions or expenditures in connection with the election of Federal candidates by a labor organization, consented to by officers of such an organization, are not prohibited by Section 610, Title 18, United States Code, where such contributions are made from funds voluntarily designated for such purpose by all or a part of the individual members of such labor organization, so long as there is a *bona fide* accounting of such funds, and so long as the amounts of such contributions or expenditures do not exceed the voluntary funds so designated." 41 L. C. at 23,381.

This then was the state of the law,[25] when in late 1962, the organizers of the Pipefitters' Voluntary Fund con-

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[25] Also decided prior to the creation of the Fund in its present form was **United States v. Anchorage Cent. Labor Council**, 193 F.Supp. 504 (D. Alaska 1961), which held no violation of Section 610 by an association of local unions expending funds

sulted Harry Craig, the union's attorney, to advise them about the establishment and administration of a fund which would meet the requirements of law (Tr. 1788, 1887; A. 986, 1052). Mr. Craig, who also represented Teamsters Local 688, was thoroughly familiar with Section 610, as he had set up the aforementioned Teamster Fund, which had just been successfully upheld in court (Tr. 1890; A. 1054).[26] Unlike the Teamsters' plan, Mr. Craig (and other lawyers) recommended the establishment of the Pipefitters' Voluntary Fund in which the contributions would not be collected by checkoff, the contributions would be individually made by the members, pledge cards would be obtained expressing the contributors' intention to contribute voluntarily, and the monies of the voluntary fund would be segregated and kept apart from the funds of Local 562 (Tr. 1847-49, 1970-71, 1898-1900; A. 1026-27, 1059-61).[27] For a more detailed discussion of the legal

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for federal political purposes out of the association's general fund, because the funds were voluntarily contributed by each member local. Both **United States v. Teamsters Local 688**, *supra*, and **United States v. Anchorage Cent. Labor Council**, *supra*, are stronger cases for violation of Section 610 than the case at bar.

[26] Since **United States v. Teamsters Local 688**, *supra*, was not appealed by the government, it was a final decision presumably binding on any prosecution in the United States District Court for the Eastern District of Missouri, Eastern Division. Since Attorney Craig and Local 562 were both located in that district, Craig, therefore, gave great weight to the Teamsters' decision in establishing the Pipefitters' Voluntary Fund.

[27] Certainly, the establishment of the Pipefitters' Voluntary Fund in this manner is more beyond the scope of Section 610 than the Teamsters' plan for the following reasons: (1) The contributions to the Pipefitters' Voluntary Fund are not deducted automatically by the employer as part of dues like the Teamsters' plan, but rather are given by the individual members directly; (2) at no time are the pipefitters' contributions commingled with dues, whereas under the Teamsters' plan, the contributions are part of dues or at least commingled with dues at checkoff, depending upon whether those contributing have more checked off than non-contributors; and (3) the voluntary contribution under the Teamsters' plan is integrated into the collective bargaining process.

advice given with respect to the establishment of the Pipefitters Voluntary Fund, see the Statement of Facts, *supra*, at pp. 16-23.

Subsequently, the Pipefitters' Voluntary Fund was formed, administered and maintained in accordance with these recommendations of the lawyers, which recommendations were believed to be in keeping with the strictest requirements of Section 610. See, Statement of Facts, *supra*, at pp. 24-29 with respect to the management and operation of the Pipefitters Voluntary Fund.

Nevertheless, the government throughout the course of these proceedings departed from the aforementioned traditional concept of Section 610. The instant case was brought, tried and submitted, not on the theory that the contributions by members of Local 562 were **involuntarily made**, but rather on the basis that, even if all of the contributions to the Fund were voluntary, still the Fund was violative of Section 610. Thus, nowhere in the indictment was it alleged that the union members did not voluntarily contribute to the Fund or that union members were coerced into contributing by making the contributions to the political fund a condition of employment. Instead, it was alleged that the Pipefitters' Voluntary Fund had "the appearance of being a wholly independent entity, separate and apart from Local 562" whereas in reality it was not (Indictment, paragraph 10). See Argument I, *supra*, at pp. 51-69 concerning error in failing to dismiss the indictment and in overruling petitioners' motions for judgment of acquittal.

Furthermore, the district court instructed the jury that it could find that the Pipefitters' Voluntary Fund was a union fund by all the facts and circumstances in evidence. The fact that the contributions were voluntary was only one of many circumstances submitted for the jury's consideration in determining whether a violation of Section

610 had occurred (Tr. 2070-73; A. 1112-15). See the Statement of Facts and Argument II, *supra*, at pp. 42, 69-78, with respect to error in the district court's instructions.

The majority opinion of the Court below affirmed and approved the prosecution's theory, despite the contrary legislative history and judicial authority. **United States v. Pipefitters Local Union No. 562**, 434 F.2d 1116 (1970). The problem, of course, with this interpretation of section 610 is that it is utterly devoid of any standards or guidelines which provide advance notice or warning as to what conduct is prohibited. See, **Note**, 49 Texas L. Rev. 384, 389-91 (1971); Chang, **Labor Political Action and the Taft-Hartley Act**, 33 Neb. L. Rev. 554, 570 (1954); Lambert, **Corporate Political Spending and Campaign Finance**, 40 N.Y.U.L.Rev. 1033, 1063-64 (1963). Certainly, the decisions of the Courts below hold that voluntariness of the contributions attaches no significance, and, since the fund in the instant case was kept in a separate bank account (Tr. 184, 1489-90; A. 62-3, 791-92), apparently the physical segregation of the fund is not important either. If, as the Eighth Circuit now seemingly holds, any fact or circumstance—which literally involves countless thousands of conceivable combinations—can be placed into evidence to establish that a voluntary political fund is a union fund, who can be assured at the time such a fund is established, that he will not at a later date be the subject of prosecution?

The far-reaching ramifications of the courts' decisions are heightened by the well known fact that all international labor unions, most local unions and many conglomerate corporations, have political organizations or funds similar to, or even less designed to avoid the proscriptions of Section 610 than the Pipefitters' Voluntary Fund. Alexander, **Financing the 1960 Election** 42 (1962), **Financing the 1964 Election**, 64 (1970) (contained in **Studies in Money in Politics, 2 Vols**); Clover, **Political Contributions by Labor Unions**, 40 Tex.L.Rev. 665 (1962); Alexander &

Meyers, **The Switch in Campaign Giving**, Fortune, Nov. 1965, at 216.[28] And since Section 610 applies to the receiver as well as the contributor, it may be reasonably expected, therefore, that a myriad of prosecutions may some day be heaped upon politicians opposed to those in public office in the hope that juries will somehow be able to ferret out any and all circumstances in evidence to determine violations of Section 610.[29] Under such a situation, seemingly identical facts will give rise to inconsistent verdicts, based upon the mere whim and conjecture of the jury. The subjective attitude of the jury, rather than the express objective language of the statute, will be the controlling factor for all practical purposes. Our prisons may become filled with innocent victims, who, as the

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[28] Some of the political funds of labor are referred to in the evidence. These include: COPE, Trainmen's Political Educational League; Amalgamated Meatcutters and Butcher Workmen of North America, COPE, Int'l Ladies Garment Workers Union, 1964 Campaign Committee, New York, N.Y.; State A.F.L.C.I.O. COPE; G. B. B. A. Political Education League; Allied Industrial Workers Region No. 9 COPE Fund; Int'l Union of Electrical, Radio and Machine Workers—COPE Fund, Washington, D.C.; Int'l Chemical Workers Union, Akron, Ohio; Railway Clerks Political League COPE Fund; American Radio Assn. AFL-CIO United Steelworkers of America, COPE, Washington, D.C.; Oil, Chemical and Atomic Workers Int'l Union COPE Fund, Denver Colo.; Railway Labor's Political League COPE Fund, Detroit, Mich.; Nat'l U. I. U. Trades Campaign Committee, Philadelphia, Pa.; U.A. W. A.F.L.-C.I.O. Region 10, Voluntary COPE Fund, Milwaukee, Wis.; Int'l Typographical Union; Communication Workers of America (Tr. 524-27, 539, 543, 549-50, 582-83, 813-14, 818-21, 828, 840, 844, 1890; A. 409, 412-14, 1054).

Large contributions in the 1970 Congressional election came from corporation political funds interested in aerospace and defense, such as Ling Temco Vaught, McDonnell-Douglas Corporation, Northrop Aircraft Corporation, Olin Corporation and Union Oil Co. St. Louis Globe-Democrat, April 12, 1971, p. 12A.

[29] Since May, 1969, there have been at least sixteen cases of this type. **Department of Justice News Release,** June 30, 1970. Moreover, many other political funds of labor unions and corporations, although not yet under indictment, are being scrutinized for violations of Section 610.

petitioner here, are convicted upon speculation by juries given no direction, as a result of the imprecise nature of the statute.

If the present interpretation of Section 610 be allowed to remain it seems likely that the ultimate grave consequences of the statute will be some day used for political prosecution. Section 610 is now rendered capable of distortion, beyond any realm of its legislative intention, to become a trap for the knowledgeable and unwary alike. The victorious political party will have a strong weapon in its arsenal with which to prosecute officials of those union and corporate funds as well as anyone in receipt of contributions who oppose its political positions. Indeed, the instant case supports such fears; for here the petitioners did all in their power to comply with the law. They sought and obtained competent legal advice as to the method of creating and operating a separate political organization (Tr. 1791-93, 1797, 1887, 1890-96; A. 987-89, 991-92, 1052, 1054-59). Not only did the evidence show that the petitioners consciously followed this advice, but apparently the jury believed that the petitioners consciously followed such advice, since the jury expressly found that petitioners did not engage in a wilful violation of the law (Tr. 2083; A. 1125-26). Only because Section 610, as construed by the courts below, is so wrought with confusion, do petitioners stand convicted before this Court.

The admonition of Mr. Justice Rutledge in his concurring opinion in **United States v. CIO**, *supra*, at 147, 151, has come to pass:

> "Notwithstanding accepted canons of statutory construction, it certainly would be going far to expect laymen, or even lawyers, to read a statute so lacking in specificity concerning its basic criterion with any semblance of understanding of its limitations.
>
> "The lawyer might indeed read the Congressional Record and conclude that the source of the funds

used was the crux. But even he would be left in broad and deep doubt whether it would turn multitudinous situations one way or the other."

In light of Section 610's interpretation by the courts below, not only must men of common intelligence, at peril of their liberty and property, guess and speculate as to its meaning and differ as to its application, **Lanzetta v. New Jersey**, *supra*, 306 U.S. at 452, **United States v. L. Cohen Grocery Co.**, *supra*, 255 U.S. at 391, **Connally v. General Construction Co.**, *supra*, 269 U.S. at 391, but so also must scholars, lawyers and judges.[30] See **Note**, 49 Texas L. Rev. 384, 389-91 (1971).

As the matter now stands, neither union officials, their attorneys, nor persons to receive the funds will be able to predict what type of political fund will provide sanctity from prosecution. The only safe course of conduct will be for union members to undertake no political action at all and for political parties and federal campaigners to refuse expenditures and contributions in their behalf. As such, the statute, as construed by the courts, encroaches upon the fundamental freedoms of expression, assembly and petition guaranteed by the First Amendment (See Argument III, *supra*). Where a statute operates to restrain protected First Amendment freedoms, stricter standards of permissible statutory vagueness are to be applied. **N.A.A.C.P. v. Button**, 371 U.S. 415, 432, 83 S. Ct. 328 (1963); **Smith v. California**, 361 U. S. 147, 151, 80 S. Ct. 215 (1959); **Herndon v. Lowry**, *supra*; **Winters v. New**

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[30] It is significant that the three dissenting judges in the instant case, namely Judges Heaney, Lay and Bright gave Section 610 the same interpretation which the petitioners' lawyers gave it. See Appendix at pp. 1159-78. Surely, if trained federal appellate judges and experienced lawyers differ on what the statute means, can we expect union officers and officials to know when their conduct will be within the ambit of illegality and be made to suffer imprisonment for actions they believed lawful?

York, *supra*, 333 U.S. at 509-10, 517-18; **Thornhill v. Alabama**, 310 U.S. 88, 60 S. Ct. 736 (1940); **Baggett v. Bullitt**, *supra*; **Dombrowski v. Pfister**, 380 U.S. 479, 83 S. Ct. 1116 (1965); **Stromberg v. California**, *supra*, 283 U.S. 369; **Cramp v. Board of Pub. Instruction of Orange County, Fla.**, *supra*, 368 U.S. at 287. As the Supreme Court recently stated in **Ashton v. Kentucky**, 384 U.S. 195, 200, 86 S. Ct. 1407 (1966):

> "Here, as in the cases discussed above, we deal with First Amendment rights. Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer."

See also, **United States v. CIO**, *supra*, 335 U.S. at 142 (Rutledge, J., concurring) (1948).

Yet, the interpretation given Section 610 by the courts below unnecessarily abridges First Amendment rights in achieving the legislative purpose of the statute. See e.g., **International Association of Machinists v. Street**, 367 U.S. 740, 773, 81 S. Ct. 784, 802 (1961). The government's interest in the minority union member's protection can as easily be insured under the traditional concept of treating illegal only involuntary and coercive political funds of unions. The English have accomplished what Congress in the enactment of Section 610 sought while at the same time permitting union political activity in the Trade Union Act of 1913, 2 and 3, Geo. 5, c. 30, reenacted by Trade Disputes and Trade Union Act of 1946, 9 & 10, Geo. 7, c. 52. And since Section 610 prohibits all expenditures, rather than merely excessive ones (cf. §§ 13 and 20 of the Hatch Act, 18 U.S.C., §§ 608, 609, providing for $3,000,000 limit on political committees and $5,000 limit on individuals annually), the statute's purpose of protecting the

election process from undue influence can be maintained only by a narrow construction. See **United States v. UAW**, *supra*, at 352 U.S. 596-98 (Douglas, J. dissenting); Note, 49 Texas L. Rev. 384, 390-391 (1971). To the contrary, however, the Court below has given section 610 the broadest possible meaning, totally emasculating First Amendment rights on a wholesale basis.

Our country, founded upon the precepts of due process and the fundamental freedoms of expression and assembly, can ill afford to have so vague and uncertain a legislative enactment as Section 610 is now interpreted find lodgement in our laws. At the very least, since the petitioners were fortuitously the victims of a retroactive judicial enlargement of Section 610 by the interpretation of the courts below, they should be discharged of their convictions for wilfully conspiring to violate Section 610. This Court has afforded such relief in the past. See, e.g., **James v. United States**, 366 U.S. 213, 221-22, 81 S. Ct. 1052 (1961).[31]

B.

Additionally, the statute on its face is unconstitutionally vague. In **United States v. L. Cohen Grocery Co.**, *supra*, where the Lever Act, ch. 80, § 2, 41 Stat. 297 (1919), which made it "unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" was held void for vagueness, this Court stated:

"Observe that the Section forbids no specific or definite act. It confines the subject-matter of the

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[31] Since petitioners in the instant case were charged only with conspiring to violate Section 610, their conduct had to be found wilful by the jury to be convicted. See Argument VII, *infra*. Thus the instant case is within **James v. United States**, *supra*.

investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against" (Id., 255 U.S. at 89).

See also, **Weeds, Inc. v. United States**, 255 U.S. 109, 41 S. Ct. 306 (1921), as to the same statute.

In **United States v. Cardiff**, *supra*, the Court considered § 301 (f) of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), which prohibited "[t]he refusal to permit entry or inspection as authorized by Section 704, 52 Stat. 1057 (1938). Section 704 authorized federal officers or employees "after first making request and obtaining permission of the owner, operator, or custodian" of the plant or factory "to enter" and "to inspect" the establishment, equipment, materials and the like "at reasonable times". In holding the statute too vague to sustain a conviction for its violation, the Court declared:

> "However we read § 301 (f), we think it is not fair warning . . . to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice." Id. at 344 U.S. 176.

See also, **Watkins v. United States**, 354 U.S. 178, 209-16, 77 S. Ct. 1173 (1957); **Weissman v. United States**, 373 F.

2d 799 (9th Cir. 1967).[32] Section 610 on its face is equally, if not more vague and uncertain as the above cited statutes.

On other occasions this Court has held that certain statutes provided fair warning, but only because they punished **willful, intentional** or **knowing** violations. Thus, in upholding § 20 of the Criminal Code, 35 Stat. 1092 (1909), it was stated in **Screws v. United States**, 325 U. S. 91, 102, 65 S.Ct. 1031 (1945):

> "The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

See also, **United States v. Petrillo**, 332 U.S. 1, 7, 67 S. Ct. 1538 (1947); **United States v. Ragen**, 314 U.S. 513, 524,

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[32] Similarly, this Court applying the due process clause of the Fourteenth Amendment has struck down many vague state statutes. Some examples are: **Rabeck v. New York**, *supra* (prohibiting the sale of "any . . . magazines . . . which would appeal to the lust of persons under the age of eighteen years or to their curiosity as to sex or to the anatomical differences between the sexes"); **Winters v. New York**, *supra*; **Giaccio v. Pennsylvania**, *supra* ("[I]n all cases of acquittals . . . the jury . . . shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs . . ."); **Domboroski v. Pfister**, 380 U.S. 479, 85 S. Ct. 1116 (1965) (defining a "subversive organization" and a "communist front organization"); **Baggett v. Bullitt**, *supra*; **Cramp v. Board of Pub. Instruction of Orange County, Fla.**, *supra*; **Thornhill v. Alabama**, 310 U.S. 88, 60 S. Ct. 736 (1940) ("Any person . . . who without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any person, . . . or who picket the works or place of business of such other persons, . . . shall be guilty of a misdemeanor"); **Lanzetta v. New Jersey**, *supra* ("Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any

62 S. Ct. 374 (1942); **Hygrade Provision Co. v. Sherman**, 266 U.S. 497, 502-503, 45 S. Ct. 141 (1925); **Omaechevarria v. Idaho**, 246 U.S. 343, 348, 38 S. Ct. 323 (1918).

However, since Section 610 does not require willfulness, intent or knowledge for its violation and those elements were indeed found by the jury **not** to be present here (See Argument VII, *infra*), the statute is utterly devoid of any criteria which can save it from its unconstitutional vagueness.

Mr. Justice Rutledge in his concurring opinion in **United States v. CIO**, *supra*, 335 U.S. at 151-53, eloquently demonstrated the "encyclopedic scope" of the statute by at least two of its terms. To his language is now added the further doubt created by the interpretation of the courts below. As such, petitioners submit that Section 610 should be held by this Court to be void as unconstitutionally vague and indefinite.

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crime in this or in any other state, is declared to be a gangster"); **Stromberg v. California**, *supra* ("Any person who displays a red flag, banner or badge or any flag, badge, banner, or device or any color or form whatever in any public place or in any meeting place or public assembly, or from or on any house, building or window as a sign, symbol or emblem or opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character is guilty of a felony"); **Herndon v. Lowry**, *supra*; **Wright v. Georgia**, *supra*; **Bouie v. City of Columbia**, *supra*; **Smith v. Cahoon**, *supra*; **Ashton v. Kentucky**, *supra*; **International Harvester Co. v. Kentucky**, 234 U.S. 216, 34 S. Ct. 883 (1914); **Connally v. General Construction Co.**, *supra*; **Cline v. Frink Dairy Co.**, *supra*; **Smith v. California**, *supra*; **Champlin Refining Co. v. Corporation Comm. of Okla.**, 286 U.S. 210, 243, 52 S. Ct. 559 (1932):

An excellent discussion of unconstitutionally vague statutes is contained in Note, **The Void for Vagueness Doctrine**, 109 U. Pa. L. Rev. 67 (1960).

V

18 U.S.C., § 610 as Construed and Applied by the Courts Below and on Its Face Arbitrarily Discriminates Against Labor Unions, Its Members and Persons of the Laboring Class, Depriving Them of Liberty and Property Without Due Process of Law in Violation of the Fifth Amendment.

Encompassed within the due process clause of the Fifth Amendment is the prohibition against unjustifiable, arbitrary and discriminatory governmental action. **Schneider v. Rusk**, 377 U.S. 163, 168, 84 S. Ct. 1187 (1964); **Bolling v. Sharpe**, 347 U.S. 497, 74 S. Ct. 693 (1954), opinion supplemented, 349 U.S. 294, 75 S. Ct. 753 (1955); **Hirabayashi v. United States**, 320 U.S. 81, 100, 63 S. Ct. 1375 (1943); **Nichols v. Coolidge**, 274 U.S. 531, 542, 47 S. Ct. 710 (1927); **Hurd v. Hodge**, 334 U.S. 24, 35-36, 68 S. Ct. 847 (1948).

The discriminatory aspects of Section 610's interpretation by the Courts below are best approached from the role of organized labor in politics. Labor has been active in politics since even before the birth of this country. See e.g. Woll, **Unions in Politics: A Study in Law and the Workers Needs**, 34 S. Cal. L. Rev. 130, 144-45 (1961); Raybeck, **A History of American Labor** 23-36 (1959). The role is well documented. See generally, Commons, **History of Labor in the United States** (1935); Dulles, **Labor in America** (1955); Raybeck, **op. cit.**, *supra*; Karson, **American Labor Unions and Politics, 1900-1918** (1958).

There is, of course, a recognized need for labor to be involved in politics. **International Association of Machinists v. Street**, 367 U.S. 740, 812-16, 81 S. Ct. 1784 (1961) (Frankfurter, J. dissenting). **United States v. CIO**, *supra*, 335 U.S. at 144 (Rutledge, J. concurring). Indeed, the whole history of American labor, if anything, stands for the proposition that political and legislative activity is a

necessary element of any collective effort by persons of the working class to improve their social and economic conditions. Woll, *supra* at 149. Through collective political action, labor unions have achieved economic goals, which would have been impossible to attain either by members working individually or through the collective bargaining process. Chang, **Political Action and the Taft-Hartley Act**, 33 Neb. L. Rev. 554, 575 (1954). These include *inter alia* public education, social insurance, adequate housing and anti-depression economic policy. Reynolds, **Labor Economics and Labor Relations**, 80-82 (1959). Further, even some goals, such as minimum wages, maximum hours and child labor laws, although attainable through collective bargaining, are achieved more rapidly through the political process. *Ibid.* The legitimate interest of labor in politics coupled with the union's rank and file members becoming politically educated and thereby better informed citizens is the rationale of working men uniting for political action.[33] If, however, members of the laboring class are not free to engage in political activity on the identical basis as groups or associations who oppose labor, then members of the laboring class are surely at an unfair discriminatory disadvantage.

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[33] Article II of the present AFL-CIO Constitution lists two objectives, specifically dealing with political activity as follows:

> "5. To secure legislation which will safeguard and promote the principle of free collective bargaining, the rights of workers, farmers and consumers, and the security and welfare of all the people and to oppose legislation inimical to these objectives.
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> * * * * * * * *
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> "12. While preserving the independence of the labor movement from political control, to encourage workers to register and vote, to exercise their full rights and responsibilities of citizenship, and to perform their rightful part in the political life of the local, state and national communities."

It is, therefore, particularly in the area of due process-equal protection under the Fifth Amendment that the construction of the statute by the Eighth Circuit cannot be reconciled with the necessary role of organized labor in politics. On the one hand, in order to justify the manner in which the instant case was prosecuted and tried (the indictment, the sufficiency of the evidence, the instructions), as being within the scope of Section 610, necessarily requires the holding that voluntariness of the contributions is inconsequential for a violation of Section 610. See Arguments I and II, *supra*. On the other hand, any validation of Section 610 with respect to the due process-equal protection requirements of the Fifth Amendment must logically be premised upon the proposition that Section 610 does not punish non-coercive collective political contributions by the laboring class. This irreconcilable dilemma resulting from the Eighth Circuit's interpretation of Section 610 is clearly evident in the following language of its opinion:

> "The argument is that the corporate executives personally make political contributions which have an impact on the political process, and § 610 prohibits members of the working class from aggregating their funds to have a similar impact. The problem with this argument is that § 610 does not prohibit working men from such activity. Section 610 only prohibits them from being forced into it." **United States v. Pipefitters Local Union No. 562**, 434 F. 2d 1116, 1124 (8th Cir. 1970).

Yet, under the Eighth Circuit's interpretation of Section 610, in the light of the record in the District Court, no consideration at all is given to the issue of whether the contributions by union members were voluntary, so that under its ruling even if the aggregation of funds is non-coercive, section 610 is still violated. See **United States v. Pipefitters Local Union No. 562**, *supra*, at 1120. This

diverse treatment of Section 610 serves to illustrate the lengths to which logic must be stretched in order to conform to the Court's interpretation of Section 610 with due process-equal protection. Either the Eighth Circuit's interpretation of the statute cannot be sustained, or Section 610, as so construed and applied, must be struck down as violative of the petitioners' guarantees of equal protection under the due process clause of the Fifth Amendment. Mere rationalization will not eradicate the dichotomy existing between a broadsweeping pervasive construction of Section 610 and discrimination against members of the working class created thereby.

The practical effect of the Courts' interpretation of the statute, if it be permitted to stand, will be to drive out persons of the laboring class from collective political action in any form. Since union officers, labor officials, and their attorneys will be unable to predict with any degree of certainty what positive political activity will not result in prosecution and conviction, save no political action at all, members of the laboring class will not dare hazard into the political arena, lest they be criminally punished. See Argument IV, *supra*, with respect to the vagueness of Section 610, as construed and applied by the courts below. At the same time, those groups and associations opposed to labor will have free reign to continue their influence on elections.

Although it is true that Section 610 places a like ban on contributions to federal candidates upon corporations, yet in light of the instant interpretation, any assertion that Section 610's discrimination against unions is offset by also being applicable to corporations is futile. For it is management and business associations, such as the Chamber of Commerce and National Association of Manufacturers, which are the arch rivals of organized labor. Corporations are not associations of individuals

formed to promote common group interests through social, educational, political and other means. Corporations are separate legal entities formed for the purpose of earning profits in business. Not even remotely tacit consent is given to the use of these profits for political purposes.[34] Additionally, corporations do not enjoy constitutional liberties guaranteed to individuals and their associations. See e. g., **Thomas v. Collins**, 323 U.S. 516, 539, 65 S. Ct. 315 (1945);[35] **Hague v. CIO**, 307 U.S. 496, 514, 59 S. Ct. 954 (1939); **Liberty Warehouse Co. v. Burley Tobacco Growers Co-op Mktg. Ass'n**, 276 U.S. 71, 89, 48 S. Ct. 291 (1928); **Western Turf Ass'n v. Greenberg**, 204 U.S. 359, 363, 27 S. Ct. 384 (1907); **AFL v. Swing**, 312 U.S. 321, 61 S. Ct. 568 (1941); **Thornhill v. Alabama**, 310 U.S. 88, 60 S. Ct. 736 (1940).

Yet, unincorporated management and business associations and their political committees are nowhere prohibited by federal law from making astronomical political

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[34] Senator Pepper in the debates on section 610, cognizant of this distinction between corporations and unions, stated:

> "[T]he provisions of this measure overlook the essential differences between corporations and labor unions. A corporation is a person, but is not a citizen, under the laws of the United States. A corporation is entitled to the protection of its property, but it cannot vote, because it is not a citizen, in the sense that a person is a citizen. A labor union is not a corporation, it is simply an unincorporated association of people. In legal character, it is no different from a lodge, or a church, or the WCTU, or any other organization of human beings who got together to further their common good." 93 Cong. Rec. 6448.

See also, Overacker, **Presidential Campaign Funds** 69 (1946).

[35] In **Thomas v. Collins**, *supra*, 323 U.S. at 539, the Court declared:

> "[T]he right either of workmen or of unions . . . to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others."

donations to elect candidates hostile to the labor movement and to pass legislation injurious to labor. Indeed, these discriminatory aspects of section 610 have not gone unnoticed by some members of Congress. During the debates on the predecessor to Section 610, the Smith-Connally Act, 57 Stat. 168, 50 U.S.C. 1509 (1940 ed.), Senator Hatch stated, with Senator Connally's agreement, that for fairness it was necessary to "bring into the same class as labor organizations the employer organizations such as the United States Chamber of Commerce and the National Association of Manufacturers. If one is to be denied the privilege of making political contributions, the other should be also." 89 Cong. Rec. 5721. Senator Hatch introduced a bill containing such prohibitions on the very day the Senate passed the Smith-Connally Act over Presidential veto. 89 Cong. Rec. 6503-04. The bill passed the Senate (90 Cong. Rec. 1643), but not the House. Also, after passage of the Taft-Hartley Act, a bill was introduced in the Senate, which would have stricken from the act the prohibition on expenditures by labor unions, S. 1613, 80th Cong., 1st Sess. (1947), and a bill was introduced in the House, which would have permitted labor unions to make expenditures for political purposes, provided the members thereof voted to make funds available for such use. H.R. 4193, 80th Cong., 2d Sess. (1948). Neither bill was acted upon. On April 1, 1948, a minority report of the Joint Committee set up by the Taft-Hartley Act to observe its operation was filed urging immediate repeal of the ban on labor union expenditures. Sen. Rep. No. 986, 80th Cong., 2d Sess., pt. 2, 15 (1948).

Because Section 610 is not applicable to unincorporated management and business associations, such organizations have and will continue to spend vast amounts of money in anti-labor campaigns. This is significantly reflected in the reported expenditure of over four million dollars by the National Association of Manufacturers in 1947, the

year the instant law was passed as part of the Taft-Hartley Act, Cong. Quart. Weekly Rep. 268 (1948); Gable, **NAM—Influential Lobby or Kiss of Death?**, 15 Journ. of Politics 254, 263 (1953),[36] and the over two million dollars expenditures of the same group in 1954 for a "public information program". Key, **Politics, Parties and Pressure Groups** 100 (1958). It is beyond the purposes of this brief to detail the enormous sums of money business and management associations pour into federal campaigns. Suffice it to say that because Section 610 is a total ban on contributions by organized labor, especially in light of its expanded interpretation by the courts below, even non-substantial contributions by business and management

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[36] During the debates on the Taft-Hartley act, Senator Aiken, a supporter of the bill stated in the Senate on May 12, 1947, his feelings concerning the tremendous campaign by the National Association of Manufacturers as follows:

> "It is a wonder that Members of the Senate can hold their tempers and vote on the bill according to their best judgment, because we have been subjected to the most intensive, expensive, and vicious propaganda campaign that any Congress has ever been subject to.
>
> I do not refer to the propaganda campaign of the labor unions, although I hold no brief for that. I refer to a propaganda campaign which has cost well into the millions of dollars. I should not be surprised if the total amount spent in this campaign would amount to at least $100,000,000. I told the Senate last spring that the single March advertising campaign in the newspapers against labor by the National Association of Manufacturers cost $2,000,000, and that statement has not been contradicted as yet, although it was made a year ago. . . .
>
> If the conference committee undertakes to do to the bill what certain organizations, including the Chamber of Commerce of the United States, the National Association of Manufacturers, and the Committee for Constitutional Government, Inc. wish to have done to it, such a bill should not become law, and the President would be fully justified in vetoing it." 93 Cong. Rec. 5015-17.

See also the remarks of Representative Arthur G. Klein (93 Cong. Rec. 3421); Representative Frank Buchanan (93 Cong. Rec. 3451); and Senator James E. Murray (93 Cong. Rec. 7469) as to the National Association of Manufacturers' participation in the Taft-Hartley legislation.

associations still presents a discriminatory favoritism toward business and management. Kallenbach, **The Taft-Hartley Act and Union Political Contributions and Expenditures**, 33 Minn. L. Rev. 1, 22 (1948). Yet it would be naive to presume that business and management associations' federal campaign contributions are likely to be non-substantial.

Moreover, there are a multitude of other groups and associations not restricted by Section 610, which, although not traditionally opposed to labor, present tangible disadvantages to labor. The American Medical Association, for instance, spent more than 3½ million dollars to fight Medicare in the 1950 campaign. Hyde & Wolff, **The American Medical Association; Power, Purposes and Politics in Organized Medicine**, 63 Yale L. Journ. 938, 1012-17 (1954). Miscellaneous national committees spent approximately $790,000, $851,000 and $1,963,000 in the 1956, 1960 and 1964 elections respectively. Alexander, **Financing the 1960 Election** 43-44 (1962), **Financing the 1964 Election** 65 (1970) (contained in **Studies in Money in Politics**, 2 vols.). Section 610's inequality is further highlighted by the fact that the communications media, which have no statutory restraints, are controlled by pro business-management and anti-labor interests. See, Zeigler, **Interest Groups in American Society** 134-35 (1964), **Hearings Before the Committee to Investigate Expenditures, Campaign Expenditures, Bhd. of Rd. Trainmen**, 79th Congress, 2d Sess., res. 645, pt. 6, at 262 (1946). See Argument I, *supra*, at pp. 67-8.

To the above-mentioned anti-labor money contributed in federal campaigns must also be added the funds contributed by wealthy individuals and their families in overt circumvention of the prohibitions of the Hatch Act (18 U.S.C., § 608) and of Section 610. Thus, for example, twelve families contributed $1,153,735, $646,521

and $602,926 during the 1956, 1960 and 1964 presidential campaigns,, respectively. Alexander, **op. cit.**, *supra*, **Financing the 1960 Election**, 61 (1962), **Financing the 1964 Election**, 89 (1970).[37] Laborers can approach this kind of financial strength only by pooling their resources. Considering that for the same three elections, national level labor committees which represent millions of persons made gross disbursements of approximately $2,106,000, $2,227,000 and $3,664,000, as compared with the amount that said twelve families contributed; the discrimination inherent in our corrupt practices laws becomes evident. *Id.* **Financing the 1960 Election** at 41; **Financing the 1964 Election** at 63.

Even so, the amount of money contributed by only twelve families is no real indication of the vast sources of funds contributed by persons hostile to labor.[38] See, for example the lists of the names and amounts of the $10,000 and over political contributions in the 1960 and 1964 elections. On the average, little better than 100 persons con-

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[37] The twelve families are: du Pont, Field, Ford, Harriman, Lehman, Mellon, Olin, Pew, Reynolds, Rockefeller, Vanderbilt and Whitney.

[38] A better indication of the vast sources of money being contributed by corporations, their officials and families in politics was revealed in 1950 by General Motors with the announcement that it had given to tax-exempt propaganda outfits and trade associations more than 4½ million dollars between 1947 and 1950. H.R. Rep. No. 3137, 81st Cong., 2d Sess. 284-301 (1950); Cong. Quart. Alamanac 763 (1950).

The corporations can aggregate large political contributions in a number of ways: by listing them in various expense accounts, by having employees purchase blocks of tickets to $100-plate dinners indirectly with corporate funds, by buying advertisements in National Party Program Books, etc. and by having the executives contribute directly to campaign chests with the understanding that they will get their money back in bonuses. Taylor, **How to Give Money to Politicians**, Fortune, May 1956, at 238. See also, Kovarsky, **Unions and Federal Elections—A Social and Legal Analysis**, 12 St. L.U.L. Journ. 358, 375 (1965); McKean, **Party and Pressure Politics**, 352-53 (1949); Merriam & Gosnell, **The American Party System** 406-407 (1949).

tribute nearly $2,000,000 to the Presidential elections. *Id.* **Financing the 1960 Election** at 59, 98-103, **Financing the 1964 Election** at 88, 128-131.

Taking together the contributions by thousands of corporations, their officers and families, business and management association and other interest groups hostile to labor, the working class has always been at a disadvantage in politics.[39] The interpretation by the courts below will greatly increase this already existant disparity between the participation of labor in politics and those who oppose it, so much more so, that for all practical purposes a large segment of our society (the laboring class) will be left with no voice. This the Court has been reticent to allow in other areas of political concern. See e.g., **Baker v. Carr**, 369 U.S. 186, 82 S. Ct. 691 (1962); **Reynolds v. Sims**, 377 U.S. 533, 84 S. Ct. 1362 (1964); **Kirkpatrick v. Priester**, 394 U.S. 526, 89 S. Ct. 1225 (1969); **Wells v. Rockefeller**, 394 U.S. 542, 89 S. Ct. 1234 (1969); **Avery v. Midland County**, 390 U.S. 474, 88 S. Ct. 1114 (1968); **Williams v. Rhodes**, 393 U.S. 23, 89 S. Ct. 5 (1968); **Harper v. Virginia State Board**, 383 U.S. 663, 86 S. Ct. 1079 (1966); **Phoenix v. Kolodziejski**, 399 U.S. 204, 90 S. Ct. 1990 (1970).

Petitioners submit that in view of the unwarranted judicial enlargement of section 610 by the courts below, the statute is now rendered unjustifiably discriminatory, so as to deny members of the laboring class an active participation in federal election campaigns, while those opposed to labor have no similar restraints all in violation of the due process clause of the Fifth Amendment.

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[39] For example, during 1959, the year preceding passage of the Landrum-Griffin Act, when labor was also concerned with many State "right to work" laws, the AFL-CIO's Legislative Department and COPE together spent a total of only 1.15 million dollars. **AFL-CIO Report of the Executive Council** 18-19 (1959); Woll, **Unions in Politics, A Study in Law and the Workers' Needs**, 34 S. Cal. L. Rev. 130, 149 (1961).

VI

Section 610, Title 18, United States Code as Construed and Applied by the Courts Below, and on Its Face, Unlawfully Abridges the Rights of Petitioners and All Union Members to Vote and (to) Choose Their Senators and Representatives in Congress, as Guaranteed by Article I, Section 2, and the Seventeenth Amendment to the Constitution of the United States of America.

Section 610, as construed and applied by the courts below, and on its face, constitutes, creates, and expresses the equivalent of a blanket prohibition upon activities of union members in associating, combining, and pooling their resources to the end of political expression. It is the position of these petitioners that such a result abridges, disparages, and renders virtually meaningless the constitutionally granted right of these petitioners and all union members to choose their federal representatives.

Article I, Section 2, of the Constitution of the United States of America provides in pertinent part that:

> "The House of Representatives shall be composed of Members chosen . . . by the People of the several States,"

and, the Seventeenth Amendment to the Constitution of the United States provides that:

> "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof . . .[40]

Therefore, the right to vote for members of the Congress of the United States of America is not derived merely

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[40] In the absence of a showing that the Congress which proposed a constitutional amendment, or the state legislatures which ratified it, intended a different meaning, the Court would give effect to the natural reading of the amendment. **Valenti v. Rockefeller**, D.C.N.Y. 1968, 292 F. Supp. 851, rehearing denied, 89 S. Ct. 989, 393 U.S. 1124.

from the constitution and laws of the State in which the members are chosen, but, rather, this right has its foundation in the Constitution of the United States of America. And, this Court has long recognized that this right of qualified voters to select their congressional representatives has been granted federal constitutional protection.[41] In **United States v. Classic** (313 U.S. 299, at 314), Mr. Justice Stone, writing for the majority stated:

> "Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

The decision and that statement from **United States v. Classic**, 313 U.S. 299, 61 S.Ct. 1031 (1941), was paralleled and buttressed by the decision in **Wesberry v. Sanders**, 376 U.S. 1, 8, 84 S.Ct. 526 (1964), wherein the Court stated some two decades later:

> "We hold that, construed in its historical context, the command of Article I, Section 2, that Representatives be chosen 'by the People of the several States' means, that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[42]

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[41] **Ex parte Yarborough**, 110 U.S. 651, 4 S. Ct. 152 (1884); **Wiley v. Sinkler**, 179 U.S. 58, 21 S. Ct. 17 (1900); **Swafford v. Templeton**, 185 U.S. 487, 22 S. Ct. 783 (1902); **United States v. Mosely**, 238 U.S. 383, 35 S. Ct. 904 (1913); **United States v. Classic**, 313 U.S. 299, 61 S. Ct. 1031 (1941); **United States v. Saylor**, 322 U.S. 385; 64 S. Ct. 1101 (1944); **Smith v. Allwright**, 321 U.S. 649, 64 S. Ct. 757 (1944); **Gray v. Sanders**, 372 U.S. 368, 83 S. Ct. 801 (1963); **Wesberry v. Sanders**, 376 U.S. 1, 84 S. Ct. 526 (1963).

[42] The record of the adoption and the ratification of the Constitution fully supports this conclusion of the Supreme Court. It is stated in **United States v. Classic**, 313 U.S. 299, 316, 61 S. Ct. 1031 (1941), that "the free choice by the people of repre-

The Court further stated in **Wesberry**, supra, at 17-18:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right."

The length and breadth of the rights of qualified voters in the United States created by the Constitution has been delineated by the Court in numbers of cases. Some of these cases arose under the Civil Rights statutes, which provide remedies against private or governmental action impairing constitutionally secured rights (18 U.S.C. 241, 242; 42 U.S.C. 1981, 1983). The decisions recognize the existence, availability, and duty of federal authority to protect rights arising under Article I, Section 2.[43]

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sentatives in Congress . . . was one of the great purposes of our constitutional scheme of government . . ." The principle of popular election of the House of Representatives was debated at several points by the Constitutional Convention, and the principle consistently prevailed (II Eliot, Debates at the Federal Convention, pp. 136 et seq., 160 et seq., 223 et seq.). Madison considered popular election "as essential to every plan of free government" (Id. at 137), and the primary importance of popular election of the House of Representatives was emphasized to the voters considering ratification of the proposed Constitution in many issues of the Federalist papers (See Numbers 47, 52, 53, 55, and 57). Choice by the people was pointed to as the safeguard against tyranny and treachery by the Congress (Federalist papers, Number 55).

[43] The courts have held the following to be attributes of the right to vote which Congress may safeguard, either by application of criminal sanctions or provisions for civil relief: (a) The right to vote, either in a general election or a primary, which is an integral part of the electoral process (**Ex parte Yarborough**, *supra*; **Wiley v. Sinkler**, *supra*; **Swafford v. Templeton**, *supra*; **Smith v. Allwright**, *supra*); (b) The right to have the force of the vote protected against ballot stuffing (**United States v. Saylor**, *supra*; **Ledford v. United States**, 155 F.2d 574 (6th Cir. 1946), cert. denied 329 U.S. 733), or against the votes of

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." **Reynolds v. Sims**, 377 U.S. 533, 555, 87 S. Ct. 1382 (1964).

In **Reynolds v. Sims**, *supra*, the Supreme Court called attention to a myriad of prior cases indicating that a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted.[44] And, the Supreme Court has held that a qualified voter in an election also has a constitutional right to have his vote counted with substantially similar weight as that of any other voter in a case where the elected officials exercised general governmental powers over the entire geographic area served by the body. Avery v. Midland County, 390 U.S. 474.

The Court stated in **Evans v. Cornman** (398 U.S. 419, at 422)" . . . the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges" (The Court there citing **Yick Wo v. Hopkins**, 118 U.S. 356, 370 (1886); **Wesberry v. Sanders**, supra).

"And before that right (to vote) can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny" (**Evans v. Cornman**, supra at 422).

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unqualified voters (**United States v. Wilson**, 72 F. Supp. 812 (W.D. Mo. 1947), or against dilution by disapportioned districts (**Gray v. Sanders**, *supra*; **Wesberry v. Sanders**, *supra*); (c) The right of a qualified voter to register (**United States v. Ellis**, 43 F. Supp. 321 (W.D.S.C. 1942); (d) The right to sit on an election board, or to act as judge, inspector, or poll clerk at an election for Congressman or Senator (**United States v. Aczel**, 219 F. 917 (D. Ind. 1915)).

[44] Among the cases cited are **Ex parte Siebold**, 100 U.S. 371 (1880); **Ex parte Yarborough** *supra*; **Guinn v. United States**, 238 U.S. 347 (1915); **Lane v. Wilson**, 307 U.S. 268 (1939); **United States v. Classic**, *supra*.

The Court further states in **Evans v. Cornman**, *supra*, that a persons vote may not be diluted to give weight to other interests, citing there **Reynolds v. Sims**, supra.

In the case of **Kramer v. Union School District**, 395 U.S. 621, 89 S.Ct. 1886 (1969), Justice Warren writing for the majority stated (citing **Reynolds v. Sims**, *supra*), "Since the right to exercise the franchise is a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." The Court continued at 626:

> "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government."[45]

Therefore, the constitutionally granted right of qualified voters to choose their representatives constitutes a guarantee of the right of "effective choice" (United States v. Classic, supra, at p. 314). These petitioners submit that this constitutionally granted right of a qualified voter in the United States of America to make an effective choice of Congressional representatives requires more than simply protecting the mechanics of the casting of the vote and the counting of the ballots; these petitioners further submit that this constitutional right includes and requires group political action.

This Court in **Reynolds v. Sims**, supra, not only stated that "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," but the Court continued at p. 555:

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[45] The Court in **Williams v. Rhodes**, 393 U.S. 23, at 39, cites **Wesberry v. Sanders**, *supra*, for the proposition that the "rights of expression and assembly may be illusory of the right to vote is undermined."

"And the right of sufferage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Section 610, Title 18, United States Code, as construed and applied by the courts below, as well as on its face, constitutes such a "debasement or dilution" of the vote of these petitioners as well as all other union members, and, as such, creates a most dangerous breach from the American tradition of group political activity.[46]

The Voting Rights Act of 1965, in general, and Section 5 of that statute, in particular, give broad interpretation to the constitutionally granted right to vote, recognizing that the term "voting" means and includes "all action necessary to make a vote effective" (79 Stat. 437, 445, 42 U.S.C., Section 1973 l (c) (1) (1964 ed. Supp. I).

These petitioners submit to this Court that "all action necessary to make a vote effective" not only includes group political action, but, in certain circumstances, demands and requires such action. Section 610 as construed and applied in the courts below and on its face require union members to discard their only effective means of political expression involving their livelihood,

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[46] Mr. Justice Rutledge stated in **United States v. C.I.O.**, *supra*, 335 U.S. at 147, regarding Section 610, that "[T]he accepted principle of majority rule which has become a bulwark, indeed perhaps the leading characteristic, of collective activities is rejected in favor of atomized individual rule and action in matters of political advocacy . . ." Manifestly a nation cannot maintain effective democratic government if every individual voter must act alone. It is only through association in groups that he can further his general economic interests and hope to achieve any political effectiveness in our complex modern society. As the Supreme Court stated in **Sweezy v. New Hampshire**, *supra*, 354 U.S. at 250: "Exercise of these basic freedoms (referring to political expression) in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of the adherents."

their union (See Justice Frankfurter's dissent in the case of **Machinists v. Street**, *supra*, 367 U.S. at 800-801, 812-816). They are now forbidden voluntary association for and to the end of political expression; they may no longer seek to benefit by political and lawful means the organization to which they look for many things (see Argument I, *supra*, at pp. 54, 66). The immediate effect and result of this statute is the deprivation of working men and women of their freedom to protect their interests as union members; the statute constitutes a deprivation of union members of their only organized means of protection of their interests.

VII

The Jury by Making a Special Finding in Its Verdict "That a Willful Violation of Section 610 of Title 18, United States Code, Was Not Contemplated," Found Lacking an Essential Element (Willfulness) of Any Conspiracy Under Section 371, Title 18, United States Code to Violate a Substantive Statute Which Is *Malum Prohibitum*, and Thereby Acquitted the Petitioners.

Section 371, Title 18, United States Code provides in pertinent part that:

> "If two or more persons conspire . . . to commit any offense against the United States . . ., and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Upon the trial of this cause, the jury was provided with two forms upon which and with which to return its verdict

(Tr. 2079; A. 1119). On "Verdict Form A", the jury could find each defendant guilty or not guilty "as charged in the indictment." On "Verdict Form B", which was identical in all respects to "Verdict Form A", except that upon "Verdict Form B", was endorsed the additional special finding that: "We further find that a willful violation of Section 610 of Title 18, United States Code was not contemplated" (Tr. 2079; A. 1119).

The jury was instructed that it must employ only one of the forms supplied for expression of its verdict and that it must make a separate finding as to each defendant. The jury was further instructed that if it found the defendant guilty or not guilty of the offense charged, it was to utilize Verdict Form A; if it found one or more of the defendants "guilty of the willful conspiracy charged" and further found "that the conspiracy of which said defendant is found guilty did not contemplate a willful violation of Section 610", it was to utilize Verdict Form B (Tr. 2079; A. 1119).

Verdict Form A was disregarded by the jury, which returned a guilty verdict on Verdict Form B. By so doing, the jury specifically found that "a willful violation of Section 610, Title 18, United States Code was not contemplated" by any of the defendants (Tr. 2083; A. 1125-26). These petitioners submit that the special finding of the jury may be expressed in the following manner:

1) No defendant had knowledge that his actions, alone or in concert with the actions of the other defendants, were unlawful in violation of the provisions of Section 610, Title 18, United States Code; and

2) No defendant intended, by his action alone or in concert with the actions of other defendants, to violate Section 610, Title 18, United States Code.[47]

[47] These petitioners submit that to contemplate a willful violation of a statute requires at least knowledge that the act is un-

By so expressing itself, the jury in fact found essential elements of conspiracy under Section 371, Title 18, United States Code, lacking and its verdict was in effect an acquittal.

These petitioners submit that there can be no question that the proscriptions contained and set forth in Section 610, Title 18, United States Code are *malum prohibitum* as opposed to being *malum in se.*[48]

Where the substantive offense is *malum prohibitum*, criminal conspiracy requires both knowledge that the conduct that is the purpose of the conspiracy is unlawful or is to be affected by unlawful means and a definite and

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lawful, together with a specific intent to do that which is forbidden. The case of **Masinia v. United States,** 296 F.2d 871, 879 (8th Cir. 1963), defines "willfully" in this sense as "something not expressed by knowingly. It means purposely or obstinately, one who having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." And, **Ryan v. United States,** 314 F.2d 306, at 310 (10th Cir. 1963) states: "An act is done knowingly if it is done voluntarily and purposely, not because of mistake or inadvertence. An act is done willfully if done voluntarily and purposely and with the specific intent to do that which the law forbids. That is to say, an act done with bad purpose either to disobey or disregard the law. See also, Black, Law Dictionary, "Willful".

[48] The conduct restricted cannot be deemed an offense against the common law, and, in fact, was only recently prohibited; these petitioners submit that there is nothing inherently culpable in banks, corporations, or labor organizations making contributions or expenditures in connection with public elections. During the course of Senate debate and consideration of what is now Section 610, Title 18, United States Code, Senator Taft, recognizing this statute to be *malum prohibitum*, stated: ". . . If any abuses arise with respect to other organizations, we can extend the provision of law to the other groups." 93 Cong. Rec. 6441. See also **Morissette v. United States,** 342 U.S. 246, 72 S. Ct. 240 (1952); **United States v. Boyce Motor Lines,** 188 F.2d 889 (3rd Cir. 1951), affirmed 342 U.S. 337, 72 S. Ct. 329 (1952); **United States v. Balint,** 258 U.S. 250, 42 S. Ct. 301 (1929); Perkins, Criminal Law 692-710 (1956), on crimes *malum prohibitum.*

specific intent to do that which has been declared to be unlawful.[49] These two requirements call for and require the *mens rea* and *scienter* which represent and embody the rule and the spirit of Anglo-American criminal jurisprudence.[50]

Even assuming that an awareness of the unlawfulness of the act (and a definite and specific intent to violate the law), may not be an element of a substantive offense proscribed by Section 610, knowledge and an awareness of the unlawfulness of conduct not inherently wrongful or evil which is prohibited (and consequently intent to agree to perform an unlawful act) are necessary and indispensa-

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[49] Perkins, Criminal Law 544-546 (1957) at page 545 states that in a charge of conspiracy, "Innocence because of lack of knowledge may be established even if what is not known is a matter of law if the 'offense' contemplated by the combination is something not inherently wrong but merely prohibited by statute. While a combination for the purpose of doing what is thus forbidden is wrongful if the law is known, it is not wrongful otherwise." Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624 (1941), states at page 640: "Since the intent in conspiracy reaches beyond the act accomplished and portends the commission of a further act, and so is the substance of the offense. . . . The accused must be shown to have harbored a specific intent to do an unlawful act." See also, Harno, Intent in Criminal Conspiracy, id., 635, 646-647; Developments in the Law, Criminal Conspiracy, 72 Harvard L. Rev. 920, 935-937 (1959); Wharton's Criminal Law and Procedure, Section 85 (1959); Note, Criminal Conspiracy, 38 Harvard L. Rev. 96, 97 (1927); 15A C.J.S., Conspiracy, Section 45, at pp. 755-758.

[50] The Supreme Court in **Dennis v. United States**, 341 U.S. 494, 500, 71 S. Ct. 857 (1951), stated: "A survey of Title 18 of the United States Code indicates that the vast majority of the crimes designated by that title require, by express language, proof of the existence of a certain mental state, in words such as 'knowingly', 'maliciously', 'wilfully', 'with the purpose of', 'with intent to' or combinations or permutations of these and synonymous terms. The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence (The Court therein citing **American Communications Assn. v. Douds**, 339 U.S. 382, 411 (1950)); **Smith v. California**, 361 U.S. 147, 150, 80 S. Ct. 215 (1959).

ble elements of the crime of conspiring to violate the prohibitory statute.[51]

> "It is fundamental that a conviction for conspiracy under Section 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.' " **Ingram v. United States**, id., at 677-78.

It is hornbook law that when knowledge of a fact is required to convict for a substantive offense, knowledge is also required to convict for conspiracy to commit the substantive offense. **United States v. Ausmeier**, 150 F.2d 349 (2nd Cir. 1945); **Fulbright v. United States**, 91 F.2d 210 (8th Cir. 1937). A conspiracy is not only a separate and distinct offense from the substantive charge which is the end to which the agreement and conduct is directed (**Ingram v. United States**, *supra*; **Pinkerton v. United States**, 328 U.S. 640, 66 S. Ct. 1180 (1946); **Braverman v. United States**, 317 U.S. 49, 63 S. Ct. 99 (1943), but also because the basic ingredient of conspiracy is the agreement. The Supreme Court stated in **United States v. Falcone**, 311 U.S. 205, 61 S. Ct. 204 (1940), at 210: "The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy", the Court there citing **Pettibone v. United States**, 148 U.S. 197, 13 S. Ct. 542 (1893); **Marino v. United States**, 91 F.2d 691; **Troutman v. United States**, 100 F.2d 628; **Beland v. United States**, 100 F.2d 289. See also **Rent v. United States**, 209 F.2d 893, 896 (5th Cir. 1954). Therefore, these petitioners submit that where the proscribed action is not wrongful in and of itself, absent an

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[51] **Ingram v. United States**, 360 U.S. 672, 79 S. Ct. 1314 (1959); **Keegan v. United States**, 325 U.S. 478, 65 S. Ct. 1203 (1945); **Landen v. United States**, 299 Fed. 75 (6th Cir. 1924); **Bergen v. United States**, 145 F(2) 181, 187 (8th Cir. 1944); **United States v. Belisle**, 107 F. Supp. 283, 287 (W.D. Mo. 1951).

awareness of the illegality of the conduct, an agreement to violate the law can never exist; under these circumstances, neither can a criminal conspiracy be found.[52]

The case of **Fall v. United States**, 209 F. 547 (8th Cir. 1913), holds at 553 that ". . . where the government relies upon circumstances to prove a conspiracy . . . the case comes within that class where an intent different from the ordinary criminal intent must be shown." Of the same import are, **Fulbright v. United States**, 91 F.2d 270 (8th Cir. 1937); **Bergen v. United States**, 145 F.2d 181, 187 (8th Cir. 1944); **Blumenthal v. United States**, 88 F.2d 522 (8th Cir. 1937).[53]

In **Landen v. United States**, 299 F. 75 (6th Cir. 1924), the Court reversed a conspiracy conviction, stating:

> "It is settled that with regard to criminal prosecutions for those acts which are not *mala in se*, but which through legislative exercise of the police power have become *mala prohibita*, no conscious intent to

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[52] Since each and every agreement, be it lawful or unlawful, stands only upon and after a "meeting of the minds", **O'Neill v. Corporate Trustees, Inc.**, 376 F.2d 818, 820 (5th Cir. 1967); **A. E. Staley Mfg. Co. v. Northern Cooperatives**, 168 F.2d 892, 895 (8th Cir. 1948), it would be impossible to have an agreement to violate the law where the law is merely *malum prohibitum*, unless the parties to the agreement know that the act which is the object of the conspiracy is unlawful and mutually intend to perform that act knowing it to be unlawful. This is so because a charge of conspiracy to violate a criminal law has implicit in it the elements of knowledge and intent. **Schnautz v. United States**, 263 F.2d 525.

[53] Indeed, the Courts have gone much further in requiring what one commentary has labeled as an "anti-federal intent". Developments in the law, Criminal Conspiracy, 72 Harvard L. Rev. 920, 937 (1959); see **Davidson v. United States**, 61 F.2d 250 (8th Cir. 1932); **Linde v. United States**, 13 F.2d 59 (8th Cir. 1926); **Dickerson v. United States**, 18 F.2d 887 (8th Cir. 1927). See also, **Hernandez v. United States**, 300 F.2d 114, 121 (9th Cir. 1962); **United States v. Crimmins**, 123 F.2d 271 (2nd Cir. 1941); **Pettibone v. United States**, 148 U.S. 197, 207, 13 S. Ct. 542 (1893).

break any law is essential. The respondent need not even know that the law exists (cit. omitted). When, however, the prosecution is for conspiracy, the text books and elementary discussions seem to agree that there must be a 'corrupt intent', which is interpreted to be the mens rea, the conscious and intentional purpose to break the law (cit. omitted) . . .

. . . . . .

"We find nothing which goes further in modifying the generality of this principle than the decision of this Court in the Chadwick case, 141 Fed 225, 243, . . . to the effect that knowledge of the law which prohibits an act 'of evil design and wrongful purpose' will be imperatively imputed to the respondents, or the decision of the Second Circuit Court of Appeals in the Hamburg-American case, 250 Fed 747, 758, 759 . . . to the effect that, where the act to be done is malum in se, it is not controlling that the respondent does not in fact know of the specific prohibitory act. The principle of these two decisions does not reach a case where the contemplated act is not inherently wrongful, where the prohibitory statute is ambiguous, where there is good reason for both lawyers and laymen to think that the act planned is not prohibited, and where the respondent plans and does the act in the actual belief, supported by good-faith advice of counsel, that it is a lawful act. In such a situation the conclusion that the respondent has a 'corrupt intent' to violate the law is, in our judgment, one repugnant to the fundamental principles of justice, and not to be adopted unless under the compulsion of authoritative decisions. We find nothing requiring such adoption." Id. at 78-79.[54]

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[54] In the two federal cases cited by **Landen**, *supra*, namely **Hamburg American Steam Packet Co., v. United States**, 250 Fed. 747, 759 (2d Cir. 1918) and **Chadwick v. United States**,

Much authority in accord with the Landen case can be found.[55] And, the holding in **Keegan v. United States**, 325 U.S. 478, 65 S. Ct. 1203 (1945), supports and buttresses the position of these petitioners. In the **Keegan** case, the Supreme Court reversed convictions for conspiracy to counsel evasion of military service, stating:

> "Here the honesty and bona fides of the defendants is said to be immaterial; the fact that they desired to test the constitutionality of the law is said to be immaterial [by the 2nd Circuit]. Nowhere is it stated that Bund Command No. 37, without more, does not amount to counselling to evade military service. Mingled with instructions that innocent motives were no excuse, and the intention to test the constitutionality of the law was no excuse, are statements

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141 Fed. 225, 243 (6th Cir. 1905), the statements are dictum and inconsistent with other statements in the opinions. Furthermore, any authority possessed by the **Chadwick** case has been destroyed by the 6th Circuit, since **Landen v. United States**, *supra*, is a later case.

[55] See, e.g., **Cruz v. United States**, 106 F.2d 838 (10th Cir. 1939); **Rent v. United States**, 209 F.2d 893 (5th Cir. 1954); **Razette v. United States**, 199 F.2d 44, 50 (6th Cir. 1952); **Mackreth v. United States**, 103 F.2d 495 (5th Cir. 1939); **Pelz v. United States**, 54 F.2d 1001 (2nd Cir. 1932); **United States v. Woll**, 157 F. Supp. 704 (E.D. Pa. 1957); **United States v. Markowitz**, 176 F. Supp. 681 (E.D. Pa. 1959); **United States v. Belisle**, 107 F. Supp. 283, 287 (W.D. Mo. 1951).

There are also many state cases which would require specific intent for a conspiracy to commit a substantive offense which in malum prohibitum. **People v. Powell**, 63 N.Y. 88 (1875); **People v. Flack**, 125 N.Y. 324, 26 N.E. 267 (1891); **Wood v. State**, 47 N.J.L. 461, 1 Atl. 509 (1885); **Commonwealth v. Gormley**, 77 Pa. Super. 298 (1921); **Commonwealth v. Benesch**, 290 Mass. 125, 194 N. E. 905 (1935); **Mitchell v. State**, 248 Ala. 169, 27 So. (2) 36 (1946). The majority of these cases are approvingly discussed in Harno, Intent in Criminal Conspiracy, 89 U. Pa. L. Rev. 624 (1941). **Mitchell v. State**, *supra*, held that an indictment for conspiracy . . . would not support conviction where the indictment did not allege guilty knowledge of the defendants and the acts which were the basis of the conspiracy were not inherently unlawful.

that these are not excuses where there is a conspiracy knowingly to counsel evasion of military service. The statements are mutually contradictory. One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counseling, stealthily and by guile, to evade its command." Id. 325 U.S. at 493-94.

See also, **United States v. Falcone**, 311 U.S. 205, 61 S. Ct. 204 (1940); **Pettibone v. United States**, 148 U.S. 419, 13 S. Ct. 542 (1893); **Danielson v. United States**, 321 F.2d 441 (9th Cir. 1963).

The Supreme Court in **United States v. Rabinowich**, 238 U.S. 78, stated at 88, that

"For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws . . . involves deliberate plotting to subvert the laws . . ."

". . . conviction of conspiracy to commit the substantive offense required proof of the knowledge essential to conviction of the substantive offense itself, for '[i]f this minimum intent is not present, no offense is contemplated' by the alleged conspirators." **United States v. Roselli**, 432 F.2d 879, 889 (1970).[56]

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[56] The Court therein citing **Ingram v. United States**, *supra*; **United States v. Chase**, 372 F.2d 453, 460 (4th Cir. 1967); **Hernandez v. United States**, 300 F.2d 114, 120 (1962); **United States v. Gardner**, 171 F.2d 753, 754 (7th Cir. 1948); Developments in the law, Criminal Conspiracy, 72 Harvard L. Rev. 920, 935-37 (1959), wherein it is stated that a "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."

A conspiracy to violate a criminal statute is bottomed on an unlawful and wilful intention. **Williams v. United States**, 208 F.2d 447, cert. den. 74 S. Ct. 531, 347 U.S. 928 (C.A.Fla.).

In the case at bar, there occurred no plotting or "meeting of the minds" to either overtly or covertly breach any statute; there was evidence introduced (Statement, *supra* at 19) that petitioners relied on advice of counsel as to a legally cognizable method upon which to proceed; and there was evidence (Statement, *supra* at 19-20) of good faith compliance on the part of these petitioners with the provisions of Section 610, Title 18, United States Code. It is also evident that these petitioners, had not the vaguest intention to violate Section 610; to the contrary, each of them made every effort to comply with that section. Accordingly, these petitioners respectfully direct the attention of this Court to the case of **United States v. Murdock**, 290 U.S. 389, 54 S. Ct. 223, 78 L. Ed. 381 (1933) wherein the Supreme Court at 290 U.S. 396 stated, referring to the income tax laws that: "Congress did not intend one to become a criminal by reason of a bona-fide misunderstanding as to his duty." This case is not dissimilar in principle.

Therefore, consistent with the jurisprudential thought that the crime of conspiracy requires knowledge that the goal of the conspiracy is unlawful and a definite and specific intent to violate the law, the verdict returned by the jury upon the trial of this cause was an acquittal, since the trier of fact found that these defendants were unaware that their actions violated statutory proscriptions and, further, that they did not intend to violate the law.

VIII

The Majority of the Court of Appeals Sitting *En Banc* Erred in Refusing to Rule on the Question as to Whether the Instructions of the Trial Court Were Incorrect.

The majority of the Court of Appeals *en banc sua sponte* refused to rule on the question as to whether the Trial Court's instructions were erroneous.[57] The majority held that it could not legally rule because the petitioners prayed for a reversal and discharge in their original brief filed in that Court and did not specifically ask for a new trial. As shown in the dissenting opinions written by Judges Heaney and Lay and as we demonstrate here, the holding by the majority is not only in direct conflict with many decisions of this Court, but additionally (1) the Trial Court's instructions were in fact attacked as error by petitioners in their original brief filed in the Eighth Circuit; (2) the Court of Appeals set aside the original submission of the appeal; (3) the Court of Appeals directed the parties to file supplemental briefs for the benefit of the Court *en banc* after petitioners had specifically requested permission to file a supplemental brief for the purpose of arguing that said instruction was erroneous; (4) petitioners did file such a supplemental brief, specifically questioned the propriety of the instruction and requested a new trial without any objection or claim of abandonment by the Government; and (5) in the public interest and to guard against manifest injustice, such an obvious error should be corrected.

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[57] All three dissenting Judges held that said instructions were erroneous and that petitioners should be granted a new trial. On this issue petitioners request a new trial on the misdemeanor. Of course, such request does not waive their acquittal below by the jury on the felony charge. **Price v. Georgia**, 398 U.S. 323, 90 S. Ct. 1757 (1970).

A. Trial Court's instructions were objected to at trial and attacked as error in petitioners' original brief filed in the Court of Appeals.

As conceded by the majority opinion of the Court below, petitioners requested an instruction at trial submitting the issue of voluntariness to the jury and objected to the instruction given by the Trial Court. Thus, the majority agrees that there is no doubt but that petitioners laid the proper foundation in the Trial Court for challenging on appeal the propriety of the submission of the case to the jury.

In support of their holding, the majority misstates petitioners' original brief filed in the Court of Appeals. As shown in Judge Lay's dissenting opinion, there exists a fundamental discrepancy in the majority opinion's restatement of the constitutional issues raised by the petitioners and those issues **actually** raised by petitioners in their brief. Thus, the majority opinion states that the First Amendment issue was raised as follows:

> "Section 610 is unconstitutional because it abridged appellants' and all union members' First Amendment rights."

However, the proposition **actually** contained in petitioners' original brief was as follows:

> "Section 610, Title 18, U.S.C., **as construed and applied by the Court below**, abridges the defendants' rights as well as the rights of all union members, of freedom of speech, press and assembly and the right to petition the Government for redress of grievances, in violation of the First Amendment." (Emphasis added.)

Thus, as evidenced by petitioners' original brief filed in the Court of Appeals, the real controversy was the

application of § 610, "as construed and applied by the Court below."

The Trial Court's instruction to the jury informed them of the law of the case as it was actually tried. The instruction read:

> "The mere fact that the payments into the fund may have been made voluntarily by some or all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money" (Tr. 2075; A. 1116).

The petitioners' original brief was clearly and explicitly directed to this construction and application of Section 610 by the Trial Court. We submit that the majority's holding that the District Court's instruction was not raised as error by the petitioners in their original brief is to ignore the heart of the matter being litigated. (Judge Lay's dissenting opinion, A. 1168-78).

Even the Government, in its Brief in Opposition filed in this Court, seemingly is in agreement with petitioners. The Government states: "In essence, petitioners' claim reiterates their basic assertion, that Section 610 cannot constitutionally proscribe political activities on the part of the union where such activities are undertaken with the consent of the participants and contributions are not strictly coerced" (p. 18). Thus, the Government in its Brief in Opposition does not contend that petitioners waived the issue. Contrariwise, the Government seemingly recognizes, as did the three dissenting judges, that the argument regarding the District Court's instruction was very much a part of petitioners' basic assertion prior to trial, at trial and on appeal. We submit there was no waiver.

B. **Petitioners directed by Court of Appeals to file Supplemental Brief after original submission of the appeal was set aside.**

The Appellate Court set aside the original submission of the appeal and directed the parties to file supplemental briefs for the benefit of the Court *en banc*. Petitioners specifically questioned the propriety of the instruction in their supplemental brief, asked for a new trial and the Government did not raise the issue of abandonment or non-compliance with the Federal Rules of Appellate Procedure in their brief. (See statement at pp. 43-4, *supra.*)

We submit that assuming *arguendo* that said issue had not been fully raised in petitioners' original brief, the Court of Appeals did grant petitioners the right to file a supplemental brief for the express purpose of presenting their contentions relating to the erroneous instruction. Thus, the provisions under Rule 28(a)(2), Federal Rules of Appellate Procedure, were followed and the issue was briefed with the permission of the Court. This is not a case where a point was not raised or briefed as contended in the majority opinion below. Here, the parties were directed to file briefs; the parties did file briefs and they did **specifically** raise the issue claimed by the majority to have been abandoned, all without government objection.

C. **The majority's holding needlessly required the Court to decide the constitutional validity of Section 610 and failed to recognize the broad congressional power given appellate courts under 28 U.S.C., § 2106.**

The Trial Court refused to instruct the jury that voluntary contributions to a separate Fund are not within the scope of the statute. Clearly, the statute does not proscribe use of voluntary funds. **United States v. UAW**, 352 U.S.

567, 592 (1957); **United States v. C.I.O.**, 335 U.S. 106, 123 (1948). The majority refused to decide whether the Trial Court's instruction was erroneous because they said the instruction itself was not attacked. However, as held in Judge Lay's dissent, "Not until the statute is given its intended construction should we [the Court] weigh the constitutional issues presented [i.e., constitutionality of Section 610]" (A. 1170). Constitutional validity of any statute should not be passed upon until absolutely necessary. **Thorpe v. Housing Authority**, 393 U.S. 268, 284 (1969); **Rosenberg v. Fleuti**, 374 U.S. 449, 451 (1963); **In re Weitzman**, 426 F.2d 439, 454-55 (8 Cir., 1970).

Thus the majority needlessly decided the constitutional validity of Section 610 without the statute being given its intended construction. This was reversible error.

As shown in part "A" of this Argument (*supra*, pp. 127-28), the erroneous instruction was expressly attacked in petitioners' original brief (See footnote 2 in Judge Heaney's dissent, A. 1160). Therefore, basically, the majority opinion holds that although the Trial Court's erroneous construction of the statute was raised on appeal, the petitioners failed to ask for the right relief or remedy (a new trial), and therefore as a consequence, the judgment of conviction must be affirmed. We submit that the Federal Rules of Appellate Procedure were never intended to punish the party for failure to seek the proper relief. Decisions are replete holding that a court of appeals may shape the remedy regardless of the relief sought. See **Turk v. United States**, 429 F.2d 1327 (8 Cir., 1970); **Neely v. Eby Construction Company**, 386 U.S. 317 (1967). Further, 28 U.S.C., §2106 is good authority that the appellate courts have the power to render an appropriate judgment, decree or order as may be just under the circumstances of the case. The Federal Rules of Appellate Procedure are not concerned with **how** an issue is raised but **what** is raised.

We submit that the majority's opinion holding that a defendant is deprived of any relief from an erroneous conviction merely because he names the wrong remedy in his original brief on appeal is reminiscent of the rigid and rationalized distinctions from the days of code pleading. Such a result is untenable.

D. **Obvious errors which seriously affect the fairness and integrity of a judicial proceeding should be noticed by an appellate court to guard against manifest injustice.**

Assuming fully for the sake of argument that it is reasonable to say that petitioners did not properly attack the Trial Court's construction of the Statute on the original appeal or on the appeal *en banc*, we submit that the majority should have ruled on the correctness of the instruction because of its substantial effect upon the right of the parties. **Harris v. Smith**, 372 F.2d 806, 815 (8 Cir., 1967); **General Finance Loan Co. v. General Loan Co.**, 163 F.2d 709, 711 (8 Cir., 1947); **Lewis v. United States**, 340 F.2d 678, 683 (8 Cir., 1965); **United States v. Achilli**, 234 F.2d 797, 809 (7 Cir., 1956), aff'd 353 U.S. 373 (1957); **Forakis v. United States**, 137 F.2d 581, 582 (10 Cir., 1943).

In **Gros v. United States**, 136 F.2d 878, 880-81 (9 Cir., 1943), reversed on rehearing 138 F.2d 260, the principle is expressed:

> "It is obvious that it is immaterial in a court of justice whether the court *sua sponte* first recognizes and calls attention to a plain error 'absolutely vital to defendants' and that appellant's counsel then urges it, or that counsel first calls the appellate court's attention to the vital error."

See also **Fisher v. United States**, 328 U.S. 463, 467-68 (1946); **Screws v. United States**, 325 U.S. 91, 107 (1945); **McMillan v. New Jersey**, 408 F.2d 1375, 1377 (3 Cir.,

1969); **Garza-Fuentes v. United States**, 400 F.2d 219, 223 (5 Cir., 1968), cert. denied 394 U.S. 963 (1969); **Stephan v. United States**, 133 F.2d 87, 89-90 (6 Cir., 1943), cert. denied 318 U.S. 781 (1943).

We submit that manifest injustice should not take place in a criminal trial and lay beyond the reach of appellate review simply because a lawyer fails to protect the defendant's right in an appellate brief. Under those circumstances, an appellate court should take effective action in these circumstances even where counsel fails to properly preserve the error and should do so as a necessary exercise of judicial responsibility. As this Court has observed:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." **Hormel v. Helvering**, 312 U.S. 552, 557 (1941).

We submit that the Court of Appeals *en banc* below erred in refusing to rule on the question as to whether the instructions of the Trial Court were incorrect.

CONCLUSION

For the reasons stated herein, and in our petition for writ of certiorari, the petitioners are of the view that the judgment below of the Court of Appeals sitting *en banc* should be reversed. In the alternative, should this Court decide to dispose of this case by ruling only on Argu-

ments II and VIII, *supra*, then petitioners request a new trial on the misdemeanor of which they were convicted. Of course, such request is not a waiver of their acquittal below by the jury on the felony charge. **Price v. Georgia**, 398 U.S. 323, 90 S.Ct. 1757 (1970).

Respectfully submitted

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